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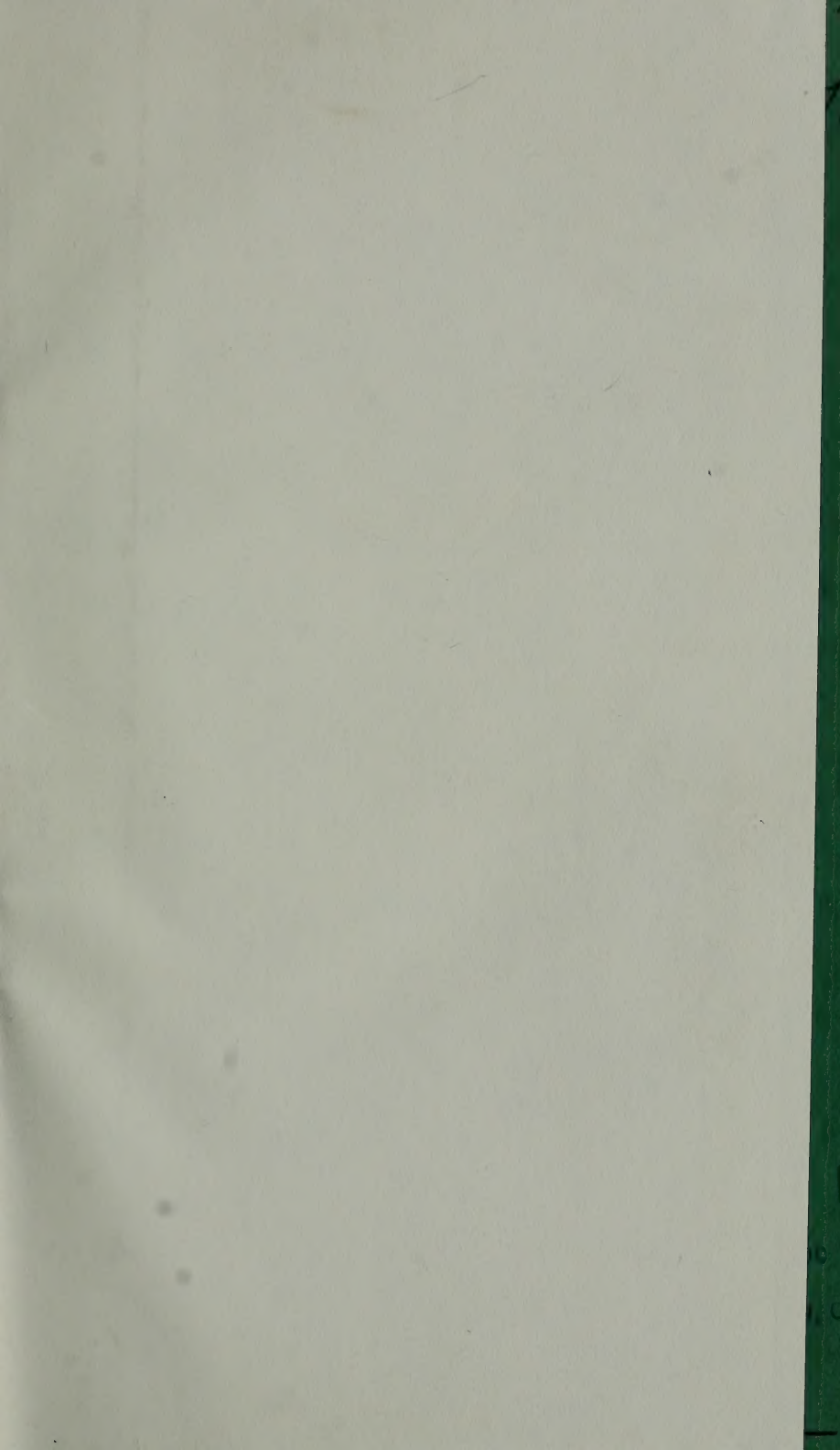
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No. 15,104

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

ORIENTAL FOODS, INC.,

Appellant,

vs.

CHUN KING SALES, INC. and JENO F. PAULUCCI,

Appellees.

CHUN KING SALES, INC. and JENO F. PAULUCCI,

Appellees-Cross-Appellants,

vs.

ORIENTAL FOODS, INC.,

Appellant-Cross-Appellee.

**OPENING BRIEF OF DEFENDANT-
APPELLANT ORIENTAL FOODS, INC.**

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FILED

DEC 27 1956

PAUL P. O'BRIEN, CLERK

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CHUN KING SALES, INC. and JENO F. PAULUCCI,
Appellees-Cross-Appellants,
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ORIENTAL FOODS, INC.,
Appellant-Cross-Appellee.

**OPENING BRIEF OF DEFENDANT-
APPELLANT ORIENTAL FOODS, INC.**

I.
STATEMENT OF JURISDICTION.

Jurisdiction of the District Court as to the patent issues is founded upon the patent statutes of the United States and Judicial Code of the United States [Complaint, Par. IV, R. 4]. Jurisdiction is admitted by defendant [Answer, Par. IV, R. 13].

The District Court's judgment was entered on January 11, 1956 [R. 91].

Within thirty days after defendant's timely motion to amend the Findings of Fact, which motion was denied on February 13, 1956 [R. 71], the defendant-appellant filed its notice of appeal on February 24, 1956 [R. 98]; and on March 6, 1956, filed an amended notice of appeal [R. 103].

Jurisdiction of the District Court over the patent issues, therefore, is founded on Title 28, Section 1338 of the United States Code. Jurisdiction of this Court of Appeals as to the appeal of the defendant-appellant Oriental Foods, Inc. is founded on Title 28, Section 1292(4) of the United States Code, and Rule 73(a) and (b), Federal Rules of Civil Procedure.

II.

STATEMENT OF THE CASE.

A. The Parties.

Plaintiff Chun King Sales, Inc. is the alleged exclusive licensee under Letters Patent No. 2,679,281 in suit. It is a large manufacturer of oriental-type food products at Duluth, Minnesota.

Plaintiff Jeno F. Paulucci is the owner of Letters Patent No. 2,679,281 in suit. He owns substantially 100% of the stock of plaintiff Chun King Sales, Inc.

Defendant Oriental Foods, Inc. is a California corporation having its place of business at Los Angeles, California. Defendant is also a manufacturer of oriental-type foods under the trademark "JAN-U-WINE".

B. The Issue.

The Complaint charges infringement by the defendant of United States Letters Patent No. 2,679,281 [PX-1, R. 541] owned by plaintiff Paulucci and allegedly licensed to plaintiff Chun King Sales, Inc. [R. 6].

The Paulucci patent in suit contains three claims. Claim 1 covers a "method" and claims 2 and 3 cover an "apparatus" for practicing the method. The Complaint, in effect, alleges infringement by the defendant of both the method and apparatus claims [Par. XIII, R. 7], and

prays for an injunction enjoining the defendant from making or using such apparatus and the method [R. 10].

By a counterclaim filed on April 14, 1955, the defendant put in issue the validity and infringement by it of *all* of the claims of the Paulucci patent in suit [R. 20-23].

At the trial of this action on November 22, 1955, *et seq.*, plaintiffs abandoned their charge of infringement of claims ^{2, 3, & 4} 1 of the Paulucci patent in suit [R. 109; 506]. The defendant urged that the District Court should rule on claims 2 and 3 but the Court refused to do so [R. 517-519]. The defendant requested the District Court to make findings of fact as to both the lack of infringement and invalidity of claims 2 and 3 [R. 94-95], but the District Court refused to do so [R. 97].

The action was tried before the Honorable Leon R. Yankwich. The District Court's Opinion [R. 67], judgment [R. 89], and Conclusions of Law [R. 88] held method claim 1 of the patent in suit valid and infringed by the use of a machine owned and operated by the defendant Oriental Foods, Inc., but made no reference to apparatus claims 2 and 3.

The only general issues before this Court on the appeal of Oriental Foods, Inc. are as follows:

- (1) Has method claim 1 of the patent in suit been infringed by defendant?
- (2) Is method claim 1 of the patent in suit valid at law?
- (3) Are apparatus claims 2 and 3 of the patent in suit valid at law?
- (4) Have apparatus claims 2 or 3 of the patent in suit been infringed by defendant?

For brevity, plaintiff's exhibits are sometimes referred to herein as "PX" and defendant's exhibits "DX". All emphasis is ours unless otherwise noted.

C. The Paulucci Patent in Suit—Generally.

The Paulucci patent in suit relates to a method and means for taping two conventional cans of food together in end-to-end relationship by the use of a conventional pressure-sensitive tape, such as cellophane tape, sold under the trademarks "SCOTCH" and "TEXCEL". The object of this, as pointed out in the Paulucci patent, is simply a merchandising stunt to permit a merchant to sell two cans for about the price of one [R. 542]. As stated in the Paulucci patent such a selling idea is old, and lacking in novelty [Column 1, lines 3-30].

Claim 1 of the Paulucci patent covers the method of taping cans together so that they can be sold as a "2-in-1" sales combination. Claims 2 and 3 cover the very simple apparatus shown in the patent. This apparatus is nothing more than a small V-shaped trough, closed at one end, and fastened to a table top, spaced from a conventional tape dispenser.

Method claim 1 of the patent in suit has four separate method steps, as follows:

[1] "aligning said cans in end-to-end relationship with adjacent end beads of said cans abutting each other.

[2] "*stretching a portion of a slightly resilient sticky tape and applying said portion of said tape over portions of the abutting beads and adjacent side walls of said cans while said tape is in a stretched condition to secure said cans together,*

[3] "*pulling on the portion of said tape not secured to said can in a direction substantially tangential to*

the periphery of the cans to place same in a *stretched condition*,

[4] "and rotating said cans on their longitudinal axes while said tape is in said *stretched condition* to cause said tape to be applied and to adhere *to the remainder of the periphery* of said beads and adjacent side walls of said cans."

It is defendant's contention that neither plaintiffs, defendant, nor anyone else has ever used the method covered by claim 1 of the Paulucci patent in suit, *i.e.*, that it is a mere "paper patent" which is not infringed by defendant.

The method of the Paulucci patent in suit [R. 541], as described in the specification, is as follows:

- (a) two cans are axially aligned end-to-end [Column 3, lines 27-29];
- (b) the tape 3 is grasped by the operator with the thumb and forefinger of one hand grasping the end of the tape and the thumb and forefinger of the other hand grasping the tape about $1\frac{1}{2}$ to 2 inches behind the other hand [Column 3, lines 35-42];
- (c) the portion of the tape between the two hands is then *stretched* by pulling the hands apart [Column 3, lines 47-50];
- (d) the stretched end of the tape is then applied over the beads of the two cans *while stretched* [Column 3, lines 51-58];
- (e) the tape is then cut off to a length sufficient to encircle the cans [Column 3, lines 63-67];
- (f) the free cut end is then pulled away from the cans to *stretch* the loose tape [Column 3, lines 67-72]; and

(g) while the tape is held in *stretched condition*, the cans are rotated in a direction tending to wind the tape around the cans while the tape is held under tension to stick *the remainder* of the tape to the cans to hold them together [Column 3, line 72, to Column 4, line 9]:

The very simple apparatus shown in the Paulucci patent is covered by claims 2 and 3 thereof, of which claim 2 as follows is illustrative:

“2. Means for securing cans together in end-to-end relationship comprising a base, a V-shaped trough secured to said base to receive said cans in said relationship and to permit the rotation of said cans together on their longitudinal axes, a holder carried on said base in spaced relation to said trough, means on said holder to receive and hold a roll of tape, and a cutter carried intermediate said trough and said means to guide and support said tape.”

This apparatus covered by claims 2 and 3 is merely a V-shaped trough or “angle iron” and a conventional tape dispenser.

D. Plaintiff's Early Commercial Use of a Similar Method and Apparatus.

Although the application for the Paulucci '281 patent was not filed until May 14, 1952, the plaintiffs as early as May, 1949, were commercially using a very similar method of taping cans together end-to-end.

Plaintiff Paulucci admitted that starting in about May, 1949, and continuing through until August, 1951, he and his company, plaintiff Chun King Sales, Inc., were using substantially the same apparatus as is shown in the Paulucci patent in suit (and claimed in claims 2 and 3)

to tape cans together end-to-end [R. 43-45, 60-63]. In particular, Paulucci admitted that such apparatus was substantially as shown in the photograph DX-A and B [R. 552-553, 193-195]. This fact is amply corroborated by the other witnesses Cronin [R. 204-206], Peterson [R. 284], and Hammond [R. 370-376, 387-389].

As admitted by Paulucci, and as amply corroborated by plaintiffs' employees, plaintiffs commercially sold thousands of cases of cans of food so taped together in 1949, 1950, and 1951 [R. 53, 64, 190-191, 401, 406-407, 420, 428].

During such taping operations, plaintiffs' plant was open and no secrecy was attached to plaintiffs' operations [R. 56].

In such early taping operations plaintiffs used the same kind of tape later allegedly used in practicing the method of the patent in suit [R. 36, 428, 436], it being a standard product on the open market. In such early taping operations, plaintiffs used a V-shaped trough to hold and align the cans and a conventional heavy duty tape dispenser [R. 44-45, 63, 193-195, 205-206, 284, 371-376].

In the 1949 commercial taping method of plaintiffs, a girl aligned two cans in a V-shaped trough, withdrew a length of tape from a tape dispenser, tabbed the loose end of the tape down over the juncture of the two cans, and then rotated the cans to wind the tape onto the cans and secure them in end-to-end relationship [R. 39-40, 45, 119, 122, 195-198, 205-207, 373-376, 428-429].

As admitted by the plaintiff Paulucci, the only difference between plaintiffs' taping operations in 1949, 1950, and early 1951 and its later taping operations (allegedly in accordance with the method of claim 1 of the patent) was merely that in its later operations more tension was

put on the tape while being wound on the cans than theretofore [R. 198-199]. Even in plaintiffs' early taping operations sufficient tension was put on the tape to make it go on the cans smoothly [R. 206, 295-297].

It is defendant's contention that with the only difference between the patented method of claim 1 and plaintiffs' 1949, 1950, and early 1951 taping operations being the amount of tension applied to the tape during winding on the cans, claim 1 is invalid for lack of invention, since applying more tension to get a smoother application of the tape is merely a matter of ordinary mechanical skill. This would occur to anyone desiring to tape two cans together. It is also defendant's contention, of course, that such early public commercial use of the apparatus shown in the patent in suit invalidates claims 2 and 3 thereof.

E. Defendant's Early Commercial Use of a Similar Method.

Defendant Oriental Foods, Inc., likewise started taping cans together end-to-end manually in June, 1949, and continued this hand operation until early 1950 when it temporarily discontinued its hand-taping operations [R. 270-272, 468-469, 472, 473-474], to recommence its hand-taping operations in 1954, which continues to this day without substantial deviation [R. 468-469].

During 1949, defendant had at least six girls manually taping cans together end-to-end continuously [R. 475]. During 1949 defendant sold thousands of cases of cans so taped together [R. 470, 475-482]. Such taped product of defendant was advertised by it in 1949 [R. 271-272]. Some of its many early sales thereof are shown by Exhibits AE-1 and AE-2 [R. 475-482].

In defendant's 1949 hand-taping operation, defendant did not use any jigs or fixtures such as shown in the Paulucci patent. A girl would stack two cans, one on top of the other; would hold the cans together with the left hand; take a piece of sticky cellophane tape precut to the proper length in the right hand; tab one end of the loose tape onto the cans over the junction beads thereof; and then rotate the cans with the left hand while holding the tape tight with the right hand, to wind the tape on the cans [R. 469, 471, 473-475].

It is defendant's contention that if plaintiffs' present manual taping method were held to be that defined by claim 1 of the Paulucci patent, then defendant's 1949 commercial hand-taping operation would make claim 1 invalid because of such commercial use of the alleged patented method more than one year prior to the application on May 14, 1952, and long prior to any alleged invention by Paulucci of the subject matter of claim 1.

F. The File-Wrapper History of the Paulucci Patent in Suit.

In his original application for the patent in suit, plaintiff Paulucci submitted method claim 1 of the patent as issued under the same number and in identical terms [R. 565]. Claim 1 was rejected by the Patent Office on certain prior art [R. 569]. In arguing against this rejection of claim 1, Paulucci through his attorney stated:

“By providing the V-shaped trough it is possible to tension the tape *in its first application* to the top beaded surfaces of the can[s] under tension *and then* to rotate the cans so that a very rigid winding under tension may be accomplished.” [R. 572.]

In the same argument, Paulucci's attorney also said:

"The novelty of the method is in the perfect alignment* in end-to-end relationship of the cans and the application of a resilient tacky tape under *strong* tension to positively insure the engagement of the tacky surface of the tape to the beads of the cans as well as the cans proper." [R. 571.]

The Patent Office then indicated claim 1 as allowable [R. 576].

Paulucci thereafter attempted to add a new method claim 4 to his application [R. 578], stating:

"Claim 4 is quite similar to claim 1 with the exception that instead of calling for the *stretching* of a portion of the resilient sticky tape to the can while in stretched condition, the tape is secured at one end to the aligned cans to anchor one end of the tape thereto. The remaining portion of the tape is then held and the cans rotated on their long longitudinal axes with the tape being pulled in a stretched condition thus causing the tape to be secured to the aligned cans in such a condition. In other words, *claim 1 might be interpreted to be limited to those conditions in which the tape is first stretched and then applied to the cans and would not cover the situation where one end of the tape is anchored to the can and then wrapped around the cans in a stretched condition.* It is submitted that substantially the same end result would accrue with respect to claim 1 and newly presented claim 4 and in substantially the same way. However, to avoid possible future attempts to escape infringement, an unwar-

*This is a false statement for there was no novelty in end-to-end alignment because the plaintiffs had been doing this since 1949 with the use of a V-shaped trough. [See DX A, B, C and D, Record 552-555 and annotated discussion at page 6, *supra*.]

ranted interpretation of claim 1 could be alleged in the manner as above suggested. Claim 4 would prevent such infringement.”

The Patent Office refused to let Paulucci add said new method claim 4 to his application, stating in effect that it was “broader” than claim 1, and was unpatentable over the prior art [R. 581].

Paulucci, through his attorney, then argued [R. 582] in favor of method claim 4, stating:

“In Claim 1 some argument might be had that if you didn’t stretch the tape before you secure the end to the can you would not be practicing the method defined therein. In other words, if you secured one end of the tape to the can and then stretched it would be outside the scope of Claim 1.”

The Patent Office then [R. 583] again refused to permit Paulucci to add proposed new claim 4, stating:

“The Examiner still considers claim 4 broader than the claims of record in this application since this claim would, by applicant’s own admission (second paragraph in amendment filed February 12, 1954, and second paragraph in letter filed March 29, 1954), make an act an infringement which act would not constitute an infringement of the claims of record herein.”

Paulucci then acquiesced in the refusal of the Patent Office to allow him new method claim 4, and accepted his patent without it [R. 584].

It is defendant’s contention that by such proceedings in the Patent Office, claim 1 of the Paulucci patent is limited to a method in which a portion of the tape (e.g., 1½ or 2 inches) is stretched before any application to the cans and before rotation of the cans, such portion

being held in stretched condition while being applied to the cans, and that since neither plaintiffs nor defendant stretches any portion of the tape before application to the cans, the Paulucci patent in suit is a mere “paper patent” and defendant does not infringe it.

G. Defendant’s Machine—Generally.

The District Court held that defendant’s operation of its *machine* demonstrated at the trial infringes the Paulucci patent in suit [R. 71].

Defendant’s machine in issue was purchased by it on May 3, 1954, for the sum of \$1550.00 from the manufacturer, Dellenbarger Machine Company, New York City [R. 100]. This was prior to the issuance of the Paulucci patent in suit, and long prior to any knowledge by defendant of the patent in suit [R. 100]. Such machine is sometimes hereinafter referred to as “defendant’s Dellenbarger machine.”

Defendant’s Dellenbarger machine is illustrated in the photographs PX-21A to 21-G [R. 545-551]. The machine itself was demonstrated at the trial [R. 154 *et seq*] and at that time marked for identification as plaintiffs’ Exhibit 21, but was not offered into evidence because it is used in defendant’s ordinary commercial operations [R. 100].

Defendant’s Dellenbarger machine is of the semi-automatic type. An operator turns on the motor, puts two cans of food aligned end-to-end in the machine, then actuates a starting lever. The machine then automatically tabs a loose end of tape, under no tension whatsoever, to the aligned cans; rotates the cans to encircle the joint with the tape; and automatically ejects the taped cans when the taping is completed.

The defendant's Dellenbarger machine does not include any V-shaped trough, as specified by apparatus claims 2 and 3. Defendant's machine is shown in the photographs Exhibits 21-A to 21-G, inclusive [R. 545-551] and in the engineering drawing which is physical Exhibit 31.

H. The Background as to Defendant's Dellenbarger Machine.

The defendant's Dellenbarger machine was made by the Dellenbarger Machine Company under license from Minnesota Mining & Manufacturing Company under its patent to Johnson No. 2,652,166, DX-S [R. 659], the latter company being referred to hereinafter as "Minnesota Company."

In the Fall of 1950, the witness Peterson designed and built a prototype can taping machine while employed by Minnesota Company [R. 278-279; 282-283; 334-335]. This prototype machine was delivered to plaintiffs' plant in Duluth, Minnesota, in December 1950, or January, 1951 [R. 227]. The witness Peterson made two trips to plaintiffs' plant to adjust this prototype machine, one on January 31, 1951, and one in April, 1951 [R. 279-280, 285-287], which trips are fully documented in the record by DX-U and V [R. 668-674]. Judge Yankwich in his Opinion [R. 70] recognized that such use, which he characterized as an experiment, was "anticipatory of the invention," and Finding 21 [R. 86] expressly finds that such work by Minnesota Company was "prior to the invention of the patent in suit."

Such prototype machine built by Peterson incorporated a tape-applying mechanism like that shown in the earlier Minnesota Company drawing DX-T [R. 667; 282-283; 287], and as shown and described in the prior art patent

to Johnson No. 2,652,166, DX-S [R. 659; 311]. As will be noted, the original drawing DX-T is substantially identical with Figs. 4, 5, and 6 of the Johnson patent DX-S.

The Peterson prototype was also similar to defendant's accused Dellenbarger machine insofar as the tape-applying operation was concerned [R. 287-294].

A. E. Johnson (not the witness in this action) designed the type-applying mechanism shown in the drawing DX-T and Peterson used this drawing in building his prototype machine [R. 282; 287]. The drawing DX-T is dated 5/19/50, and the inventor A. E. Johnson filed his application for patent No. 2,652,166 (DX-S) thereon on May 29, 1950, which patent was assigned and issued to his employer Minnesota Company. The Johnson patent DX-S was issued on September 15, 1953, and is licensed to the Dellenbarger Machine Company. It shows substantially the same taping mechanism as incorporated in defendant's accused Dellenbarger machine [R. 305-310; 333-334].

Plaintiffs claim no date of conception of the alleged invention of the Paulucci patent in suit earlier than June, 1951 [R. 120], and since Paulucci had the Peterson prototype in plaintiffs' plant as early as January, 1951, and since defendant's accused Dellenbarger machine has substantially the same tape-applying mechanism as the prototype and operates in substantially the same way to tape cans together, if defendant's accused Dellenbarger machine is held to embody the alleged invention of the Paulucci patent in suit (which we submit it does not), the prototype machine likewise must be held to embody it; and the Paulucci patent must be held invalid; because he was not the inventor of the method of claim 1 having derived it from the Peterson prototype machine.

I. The Operation of Defendant's Dellenbarger Machine.

Plaintiff presented *no* testimony or written evidence bearing on the question of whether the operation of defendant's Dellenbarger machine embodies the *four* method steps defined by claim 1 of the Paulucci patent. The machine was demonstrated in Court at the trial; and plaintiffs' counsel stated that the machine was out of adjustment, and if so operated would not infringe [R. 509]. The machine operates at the rate of about 60 revolutions per minute [R. 329], i.e., it takes only *one second* for the machine to tape a pair of cans. We suggest that neither Judge Yankwich nor anyone else could determine whether the operation of the machine embodies the *four* separate method steps of claim 1 in suit merely by watching its operation. This personal observation was all that Judge Yankwich could point to in support of his holding of infringement [R. 71].

The only *evidence* in this action clearly demonstrates the non-infringing operation of the defendant's accused Dellenbarger machine. The witness O. M. Johnson, a mechanical engineer [R. 315], having had substantial experience with machines of this type in general and with defendant's accused machine in particular [R. 316-317], clearly explained the operation of defendant's machine, utilizing the diagrams Defendant's Exhibits X, X-1, X-2, X-3, X-4 [R. 675-679] to illustrate his explanation [R. 327-333]. The engineering witness Peterson likewise explained it [R. 305-310]. The following explanation of the operation of defendant's accused machine is related to the diagrams Exhibits X, X-1, X-2, X-3, and X-4, which are reproduced in substance for the convenience of the Court at pages 51-55, *infra*.

Exhibit X, see page 51, shows the pressure-sensitive tape in a heavy black line. The roll of tape is so labeled. It rotates freely in the dispenser. The large circle, labeled *Y*, represents the cans, aligned for application of the tape. The two smaller circles are rollers which rotate the cans.

The arm marked *O* is known as the buffing arm. At its free end is a soft buffing roller *P*, the purpose of which is to conform the applied tape to the surface to which it has been applied. The tape applying arm *M* is pivoted at a common point to the side of the machine with the buffing arm [R. 323].

The tape applying roller, the buffing roller, and the clutch roller* (all so labeled) are all free rolling; none of them is driven [R. 321, 322, 323]. The function of the buffing roller "is to firmly wipe the tape in contact with two cans" [R. 330].

In Exhibit X, see page 51, the tape-applying arm *M* and the buffing arm *O* are in the rest position before the taping cycle begins [R. 327]. In this position, the free end of the tape, hanging in air, is held between the applying roller *L* and the one-way roller *C*, the outer end being free [R. 328]. With the parts in this position, the operator then turns on the electric switch which starts the motor of the machine running, and places two cans *Y* end-to-end on the rollers *I*. Two cans are shown in defendant's machine in PX-21B [R. 546]. The operator

*The so-called clutch roller more properly should be called one-way roller. It is mounted with a ratchet to prevent reverse rotation so that the tape may not unthread. Since this roller is in contact with the adhesive surface of the tape, it is serrated [see DX 21-C, R. 547] to reduce the area of contact of the adhesive to the roller [R. 352] so that it will be easier to strip off as the roller rotates.

then releases a clutch trip lever (not shown), and thereupon the tape-applying arm *M* moves down towards the cans and the tape-applying roller tabs the free end of the tape into contact with the cans [R. 328].

The tape is neither stretched nor under any tension when so applied. Compare step 2 of claim 1.

The parts will then be in the position shown in Exhibit X-1 [R. 328], see page 52.

Up to this point no tension has been applied to the tape now in contact with the cans [R. 330]. Furthermore, this movement just described forms a slack "free loop" in the tape [R. 328-329]. Such "free loop" can be seen in the photograph PX-21D [R. 548], as well as in the reproduced exhibit.

The free loop is provided by contact, later in the cycle, of the tape with the pre-stripping roller, which freely rotates. The pre-stripping roller pulls the tape from the roll [R. 332]. The free loop is necessary to "insure a positive application of the tape to the cans initially", and so that "for the first increment of rotation the tape is not under any tension" [R. 332]. The tape "can be easily wiped to the can" to make "a more positive application" [R. 332].

The cans are then rotated counter-clockwise, the position after a small increment of such rotation being shown in Exhibit X-2 [R. 329], see page 53.

In the above position, the slack "free loop" has been reduced but has not been used up completely [R. 329], the tape applied to the cans having been "wiped" thereon by the buffing and applying rollers [R. 330]. Up to this point, no tension has been applied to the portion of the tape shown in contact with the cans [R. 330].

Continued rotation of the cans through a further segment of their cycle brings them to the position shown in Exhibit X-3, see page 54.

In this position, the "free loop" of tape has been taken up, and continued rotation of the cans strips tape from the supply roll [R. 330]. Up to this point, however, at which the cans have been more than 50% wrapped with tape, there has been no tension on the tape [R. 330].

Further rotation of the cans brings them to the position shown in Exhibit X-4, see page 55.

In this position, the tape has been wrapped completely around the cans with a small loose end for overlap and the tape-applying arm has moved up and away from the cans, drawing the tape across the knife to cut it as shown [R. 331].

The cans continue to rotate for a few degrees, which permits the buffing roller to wipe the last loose tab of tap onto the cans, and the arms move up together and back to the initial position shown in Exhibit X, *infra* [R. 331]. The taped cans are then automatically ejected from the machine, and it is ready for another cycle of operation.

The cellophane tape used in defendant's machine requires a pull of $7\frac{1}{2}$ pounds to stretch it. In the operation of defendant's machine the tape is not put under sufficient tension to stretch it [R. 345]. Furthermore, while the free loop is being utilized, that is, for one-half the encircling of the cans, there is no tension at all on the tape [R. 330].

It is defendant's contention that in the operation of its Dellenbarger machine, the tape is never under tension sufficient to stretch it and there is no initial pre-stretch-

ing of any portion of the tape before it is applied to the cans, all as required by method claim 1 of the Paulucci patent in suit, and that therefore defendant's operation does not infringe the patent in suit.

J. The Prior Art.

The Johnson patent, DX-S [R. 659, application filed two years before Paulucci], covers the prototype upon which defendant's accused machine was patterned, and under which it was built [See: page 13, *supra*]. The taping mechanism of the Johnson patent is identical in function with that of defendant's accused machine [R. 305-311, 333-334]. The Johnson patent shows in Figs. 4, 5, 6, a taping mechanism substantially identical with that of defendant's accused machine [compare Exhibits X to X-4, *infra*], including a tape-applying arm 70 carrying a tape-applying roller 72 and a clutch roller 73 between which the tape passes, and a separate buffing arm 77 carrying a buffing roller 79 and a knife 80. Such form of the Johnson device is clearly described in the Johnson patent [Column 4, line 30 to Column 5, line 23]. A pre-stripping roller 122, similar to the pre-stripping roller in defendant's machine, is shown and fully described in the Johnson patent [Column 6, lines 21-66]. It is defendant's contention that if the operation of defendant's Dellenbarger machine infringes method claim 1 of the Paulucci patent in suit, the Johnson patent, which shows a similar machine, anticipates claim 1 and renders it invalid.

The Nifong patent, DX-K [R. 608] shows and describes a machine and method for winding tape on cans. The tape employed is a flexible cellophane tape having an adhesive thereon [p. 1, Column 1, lines 35-41]. While Nifong shows (Fig. 11) and describes its machine taping flat tobacco cans, it makes it clear that the machine may

be used to tape round cans [p. 1, Column 2, lines 23-27; p. 7, Column 2, lines 18-21]. The tobacco can of the Nifong patent has a bead or rib 146 around its top edge, against which the can top seats, as clearly illustrated in Figs. 1, 7, 11, and 16 [R. 608]. In the Nifong machine, "The leading end of the tape having the adhesive applied thereto, the adhesive not as yet having dried or set, is now brought into contact with the then stationary can, at the line of engagement between the body and the top or cover of the can. The can thus supported on end with the leading end of the tape in engagement therewith, is now turned for substantially a complete revolution while contacting with the taut tape [p. 1, Column 1, lines 45-54]." The Nifong patent, throughout, teaches the desirability of *holding the tape under tension* as the tape is wound on the cans, and this feature is claimed in the Nifong patent [See: Claim 51]. Such tension on the tape is sufficient to cause it to pass around the irregular contour of the bead 146 to smoothly engage the side walls of the can and top, this being clearly shown in Figs. 1, 3, 7, and 16 of the Nifong patent, exactly the same as that shown in Fig. 2 of the Paulucci patent in suit.

The Ruttan patent, DX-G [R. 595] shows it to be old in the art to secure two cans together end-to-end by applying a flexible adhesive tape or "paster" over the adjacent beads of the cans, and clearly shows the tape conforming to the curvature of the beads and extending down onto the side walls of the cans.

The Roehrl patent, DX-O [R. 644] likewise shows it to be old to join two containers together end-to-end by wrapping a sticky tape around the juncture, teaching that "SCOTCH" pressure-sensitive tape can be used for this purpose [Column 3, lines 42-48].

The Ewart patent DX-R [R. 655] shows the use of a V-shaped trough, formed by faces 23 and 27, to hold a number of cylindrical coins together in alignment end-to-end while they are wrapped, similar to the V-shaped trough 6 of the Paulucci patent in suit.

None of the foregoing patents to Johnson, Nifong, Rutan, Roehrl, or Ewart was considered by the Patent Office in connection with the application for the Paulucci patent in suit.

The other prior art patent in the record were all file-wrapper references considered by the Patent Office in connection with the application for the Paulucci patent in suit. They are included in the record to show what was before the Patent Office.

III.

SPECIFICATION OF ERRORS RELIED UPON.

1. The District Court erred in failing to find or recognize that: claim 1 of the Paulucci patent in suit is limited by its terms to a specific method, involving four steps, in a stated sequence; the steps include “stretching a portion (*e.g.*, $1\frac{1}{2}$ or 2 inches) of a resilient sticky tape and applying said portion of said tape over portions of the abutting beads and adjacent side walls of said cans while said tape is in stretched condition to secure said cans together”; the accused machine applies a free, loose and dangling end of the tape, neither stretched nor under any tension or tautness, in the initial application of the tape to the cans.

2. The District Court erred in failing to find or recognize that: the steps of the method of claim 1 also include “pulling” on the tape to apply it in a “stretched condition” to the “remainder of the priphery” of the cans; the accused

machine does not use these steps because, for about one-half the circumference, the tape is applied from a “free loop”.

3. The District Court erred in failing to find or recognize that: the applicant Paulucci sought by amendment to secure from the Patent Office a claim which did not require initial application of a portion of the tape in a “stretched condition”, as in the allowed claim (Claim 1 of the patent); such proposed claim was rejected; Paulucci acquiesced in the rejection; the plaintiffs, therefore, are estopped from applying Claim 1 to a method which does not utilize this step.

4. The District Court erred in failing to find or recognize that: more than one year prior to the date of filing of the application for patent No. 2,679,281 the plaintiff Chun King Sales, Inc. utilized in its commercial operations a method and apparatus which completely anticipates the method claimed in said claim 1, if the above quoted step is ignored, and the apparatus claimed in claims 2 and 3, and sold in the open market cans fastened together in end-to-end relationship by the utilization of said method and apparatus; the use by a patentee of a method and apparatus in packaging goods for commercial sale more than one year prior to the filing date of a patent application stands as a bar thereagainst, as a matter of law.

5. The District Court erred in failing to find or recognize that: any interpretation of said claim 1 which would support a holding of infringement by defendant's use of its method would make the claim invalid by reason of a prior

use bar; it would make said claim directly readable upon the commercial practice of plaintiff Chun King Sales, Inc. and others more than a year before the Paulucci application was filed.

6. The District Court erred in failing to find or recognize that: the patentee Paulucci did not make oath to bring the first inventor of any method of taping together two cans in end-to-end relationship which did not include the limitations of claim 1, including stretching an end portion of the tape (about $1\frac{1}{2}$ or 2 inches) and applying it in a stretched condition.

7. The District Court erred in failing to find or recognize that: any interpretation of claim 1 in suit which eliminates the limitations required by its terms and by the file history renders the claim invalid by reason of anticipation by prior patented art and prior public use.

8. The District Court erred in failing to find or recognize that: claims 1, 2, and 3 of the patent in suit are each invalid over prior patents and prior public use; the Patent Office was not advised of prior public uses, and failed to cite the most pertinent art.

9. The District Court erred in dismissing the counterclaim asking for a declaratory judgment that claims 2 and 3 of the patent in suit are invalid and not infringed by defendant, and in failing to so find.

10. Finding 7 [R. 83] is erroneous in finding that the alleged invention of the Paulucci patent in suit resides in causing the tape to pass around an irregular contour to engage the side walls of two abutting cans, or the beads

thereof in a stretched condition, whereby the tape is extended transversely of its length at an intermediate section, because unsupported by and contrary to the evidence.

11. Findings 8 and 9 [R. 84] are erroneous in finding that any problem existed in the art or that the Paulucci patent in suit teaches a solution to any such problem, because unsupported by and contrary to the evidence, and, in particular, because the method of claim 1 has never been used by plaintiff, defendant, or anyone else.

12. Finding 10 [R. 84] is erroneous in finding that the method of claim 1 of the Paulucci patent has had wide or any commercial success, because there is no evidence to support such a finding and all of the evidence is to the effect that neither plaintiff nor anyone else has ever commercially used such method.

13. Finding 11 [R. 84] is erroneous in finding that the method of claim 1 of the Paulucci patent in suit required the exercise of any inventive faculty, because there is no evidence to support such a finding and it is contrary to the evidence.

14. Finding 12 [R. 84] is erroneous in finding that the method of claim 1 of the Paulucci patent produces any result in excess of the accumulation of the separate steps of the claim, because there is no evidence to support such a finding, and errs in finding that the tape is extended transversely of its length at an intermediate section, because there is no evidence to support such a finding, the patent

in suit does not mention such a result, and it would be contrary to reason.

15. Finding 13 [R. 85] is erroneous in finding that claim 1 defines any invention, that plaintiff Paulucci was the first inventor, and that it overcame any problem in the art, because unsupported by and contrary to the evidence.

16. Findings 14 and 15 [R. 85] are erroneous in finding that the method used by defendant utilizes the steps and has the same mode of operation as the method of claim 1 or uses any invention of the patent in suit, because unsupported by and contrary to the evidence.

17. Finding 16 [R. 85] is erroneous in finding that defendant has failed to establish any instance of prior knowledge or invention of the invention of claim 1 in suit or any solution to any problem first solved by plaintiff Paulucci, because unsupported by and contrary to the evidence; in particular, defendant's method was known and used prior to any alleged invention thereof by Paulucci and if his claim 1 covers it, his patent is invalid.

18. Finding 17 [R. 85] is erroneous in finding that all prior attempts at a solution to the problem by both plaintiffs and defendant proved a failure and were abandoned, because unsupported by and contrary to the evidence; in particular, both plaintiffs and defendant successfully taped cans together end-to-end on a wide commercial scale long prior to any alleged invention by Paulucci.

19. Findings 18 and 19 [R. 86] are erroneous in finding that the prior art does not anticipate claim 1 in suit and

does not teach a solution to the alleged problem allegedly first solved by Paulucci, because unsupported by and contrary to the evidence.

20. Finding 20 [R. 86] is erroneous in finding that the prior methods of said Minnesota Company were unsuccessful and unworkable, because unsupported by and contrary to the evidence, and, in particular, because such prior methods are the same as that of defendant's method here held to infringe; and is erroneous in finding that such prior methods did not anticipate claim 1 in suit, because unsupported by and contrary to the evidence, and, in particular, because such prior methods are the same as those of the defendant held to infringe.

21. Findings 21 and 22 [R. 86] are erroneous in finding that the prior work and methods used by said Minnesota Company did not utilize the alleged invention of claim 1 in suit, and in finding that such work and methods was an unsuccessful experiment and not an anticipation, because unsupported by and contrary to the evidence.

22. Finding 23 [R. 87] is erroneous in finding that the method of claim 1 in suit is an invention over the prior methods utilized by said Minnesota Company, because unsupported by and contrary to the evidence.

23. Finding 24 [R. 87] is erroneous in finding that there was not established any prior public knowledge or use of the method of claim 1 in suit, because unsupported by and contrary to the evidence.

IV.

SUMMARY OF THE ARGUMENT.

Point 1—Claim 1 of the patent in suit is not infringed by defendant's use of its Dellenbarger machine, because Claim 1 includes the step of stretching an end portion of the tape (about 2 inches) and applying it while stretched, which step is not employed by defendant; and Claim 1 also includes other steps which likewise are not employed by defendant.

Point 2—Claim 1 of the Paulucci patent in suit is invalid on its face for lack of invention, consisting only of old and well-known steps and involving only simple mechanical skill.

Point 3—Claim 1 of the patent in suit is invalid for lack of invention over the prior public use by plaintiffs of a similar method.

Point 4—Claim 1 of the patent in suit is invalid for lack of invention over the prior public use by defendant of a similar method.

Point 5—Claim 1 of the patent in suit is invalid for lack of invention over the prior art patent to Johnson, DX-S.

Point 6—Claim 1 of the patent in suit is invalid for lack of invention over the prior art patent to Nifong, DX-K.

Point 7—Claims 2 and 3 in suit are invalid for anticipation, prior public use, and lack of invention over the prior art. Claims 2 and 3 in suit are not infringed by defendant.

V.

ARGUMENT.

Preface.

The findings adopted by the trial Court are largely in the nature of conclusions, involving mixed questions of fact and law. There is no real conflict of testimony on any straight fact question necessary to the decision in this case.

In respect to the scope of Claim 1, the disclosures in the prior art patents, and the presence or absence of invention over prior art patents and prior commercial or public uses, this Court is fully as able to reach a conclusion as the District Court.

See:

Sales Affiliates v. National Mineral Co., 172 F. 2d 608, 613 (C. C. A. 7th, 1949);

Himmel v. Serrick, 122 F. 2d 740, 742 (C. C. A. 7th, 1941).

POINT 1.

Claim 1 Is Not Infringed by Defendant's Use of Its Dellenbarger Machine.

The test of infringement of a method claim is whether the alleged infringing method includes the steps of the claim, which operate in substantially the same way to produce substantially the same result as those of the patent in suit.

See:

Craftint Mfg. Co. v. Baker, 94 F. 2d 369 (C. C. A. 9th 1938).

Claim 1 of the Paulucci patent in suit includes *four* separate steps in the method claimed. The omission of any one of these steps avoids infringement. It is defen-

dant's contention that the operation of its Dellenbarger machine does not include steps 2, 3, or 4 of claim 1, and thus avoids infringement.

Step No. 1 of Claim 1 in Suit is as Follows:

“aligning said cans in end-to-end relationship with adjacent end beads of said cans abutting each other,”

Obviously, in the operation of defendant's machine, the cans are initially aligned end-to-end, as specified in “Step 1” of claim 1 in suit.

Step No. 2 of Claim 1 in Suit is as Follows:

“stretching a portion of a slightly resilient sticky tape and applying said portion of said tape over portions of the abutting beads and adjacent side walls of said cans while said tape is in a stretched condition to secure said cans together,”

This step is plainly described in the specification of the Paulucci patent as follows: “The portion 14* of the tape between the operator's two hands is then stretched or pulled between the fingers of the two hands, by pulling the hands away from each other, and is maintained in stretched condition, under tension, as it is applied over the abutting beads 11 and 12 [Column 3, lines 47-53].”

The point is that in step 2 of the Paulucci method the tape is stretched before applied to the cans and is applied in such stretched condition. This is exactly the interpretation put upon this step of claim 1 by Paulucci's attorney and the Patent Office during the prosecution of the application for the Paulucci patent.

*About “one and one-half to two inches beyond the end 10 of the tape” [Column 3, lines 41-42].

Under Remarks in his first amendment [R. 571] the applicant stated:

“The novelty of the method is . . . the application of resilient tacky tape under *strong* tension . . .”

Five months after the Johnson patent issued (September 15, 1953) showing the tape-applying method of the accused machine, namely, tabbing a dangling end of tape to abutting ends of cans, Paulucci sought to add claim 4 by amendment after allowance, on February 12, 1954 [R. 578]. This claim 4, as to step 2 of the method, was in these words:

“attaching one end of a strip of resilient sticky tape over portions of the abutting beads and adjacent side walls of said cans to *anchor* said end of said tape thereto” [R. 578].

In remarks covering the amendment Paulucci stated that claim 4 was like allowed claim 1:

“with the exception that instead of calling for the *stretching* of a portion of the resilient sticky tape to the can while in *stretched* condition, the tape is secured at one end to the aligned cans to *anchor* one end of the tape thereto” [R. 579].

The amendment was refused because the sought claim “is broader than any allowed claim” [R. 581].

But Paulucci was persistent. He fought back, saying [R. 582] “if you *secured* one end of the tape to the can and *then* stretched it would be outside the scope of Claim 1”.

The Examiner agreed with this observation [R. 583-584], but persisted in his refusal, with the approval of the Supervisory Examiner [R. 584].

Paulucci acquiesced, and paid the final fee [R. 584].

The efforts of Paulucci to amend are understandable. For five months the Johnson patent had been a public record. The loose tabbing "to anchor one end of the tape" (proposed claim 4 of Paulucci) was clearly disclosed.

It is no answer to say that perhaps neither Paulucci nor his solicitor saw the Johnson patent, for in December, 1950 or in January, 1951 [R. 227] there was delivered to Paulucci and his company in Duluth the prototype of the defendant's accused machine, which prototype employed the same tape-applying mechanism and method as that instantly questioned.

Paulucci by his proffered claim 4 tried to stretch his claims beyond the teaching of his specification, and beyond any claim covered by his Oath to the application. Now he endeavors to stretch his claim to cover that which the Patent Office refused him. A classic example of file wrapper estoppel and abandonment exists. *Exhibit Supply Co. v. Ace Patents Corp.*, 315 U. S. 126, 136-7. It is immaterial whether the Examiner was right or wrong. *Ibid.*

Plaintiffs made no attempt to prove that the operation of defendant's Dellenbarger machine includes "Step 2" of claim 1 of the patent in suit. Defendant's uncontroverted proofs, however, clearly establish that "Step 2" is not employed in the operation of defendant's machine.

In the operation of defendant's machine (see pp. 15-19, *supra*) in the starting position shown in Exhibit X [R. 675] there is a loose end of tape over the cans. This loose end is not stretched or held stretched at any time. In the first movement of the mechanism the "applying arm *M*" drops down towards the cans, and its "applying roller *L*" merely presses the loose end of the tape onto

the cans as shown in Exhibit X-1 [R. 676]. Thus, in its initial application to the cans, the end of the tape is not stretched or under any tension whatever. It is merely tabbed or pressed onto the cans in a loose condition. This is exactly what Paulucci's attorney told the Patent Office would avoid infringement of claim 1 (See pp. 9-12, *supra*).

Thus, defendant's Dellenbarger machine omits "Step 2" of claim 1 in suit, and thereby avoids infringement. Under the law, the omission of a material method or process step, with the omission of its function, avoids infringement.

See:

Alumino-Thermic Corp. v. Goldschmidt Thermit Co., 25 F. 2d 206 (C. C. A. 3rd 1928);

Jensen-Salsberg Laboratories, Inc. v. O. M. Franklin Blackleg Serum Co., 72 F. 2d 15 (C. C. A. 10th 1934);

Anthony v. Sherman, 159 F. 2d 995 (C. C. A. 4th 1947);

And See:

Western Well Work, Inc. v. Layne & Bowler Corp., 276 Fed. 465 (C. C. A. 9th 1921);

Simons v. Davidson Brick Co., 106 F. 2d 518 (C. C. A. 9th 1939).

"Step 3" of Claim 1 in Suit is as Follows:

"pulling on the portion of said tape not secured to said can in a direction substantially tangential to the periphery of the cans to place same in a stretched condition,"

"Step 3" is clearly defined in the Paulucci specification as follows: "The operator then grasps the newly cut end of the tape with the thumb and forefinger of one hand and pulls same away from the cans in a direction sub-

stantially tangential to the cans to apply tension to the tape and to stretch the same slightly" [Column 3, lines 67-72]. Note that the tape has been severed from the roll at this point [Column 3, line 62] and is stretched by hand. Up to this point in the Paulucci method, there has been no rotation of the cans.

With defendant's machine, after the initial anchoring of the loose end of the tape onto the cans, there is no pulling of the unattached tape away from the cans, much less stretching of the tape. After its first application of the loose end of the tape to the cans as shown in Exhibit X-1, there is a "free loop" of tape between the cans and the roll of tape, as shown in Exhibit X-1. The initial rotation of the cans merely takes up some of the slack in this "free loop", as shown in Exhibit X-2. Obviously, the unattached tape is not pulled or stretched in any way up to this point.

Thus, defendant's machine does not perform "Step 3" of claim 1 and for that additional reason does not infringe.

In the use of defendant's machine it is unnecessary to stretch the tape *during* application to secure conformation over the beads of the cans, for the soft buffing roller *P* presses the tape into conformation *after* application.

"Step 4" of Claim 1 is as Follows:

"and rotating said cans on their longitudinal axes while said tape is in said stretched condition to cause said tape to be applied and to adhere to the remainder of the periphery of said beads and adjacent side walls of said cans."

This last step is described in the Paulucci specification as follows: "As the tape is held in stretched condition, the operator rotates or rolls the two cans around axially in

the trough 6 by engaging either of the cans, for they are held together by the initially applied portion 14 of the tape. The cans 8 are rolled or rotated by the operator in a direction tending to wind the tape onto the cans, and because of the stretched condition of the tape and the tension thereon, the latter is applied and secured to the cans . . . [Column 3, line 72, to Column 4, line 6].” In other words, the unattached portion of the tape is stretched by pulling on it away from the cans before *any* rotation of the cans, and then while the tape is held stretched, the cans are rotated to wind the tape in stretched condition onto the cans.

In defendant’s machine the cans are rotated about one-half a revolution, to the position shown in Exhibit X-3 [R. 678], before there is any tension or pull on the tape, because up to this point there has been a loose “free loop” in the tape, as shown in Exhibits X-1 and X-2. There has been no stretching whatever of the tape, as required by “Step 4” during this part of the rotation of the cans. Then during the balance of rotation of the cans in defendant’s machine there is still no tension put on the unattached tape sufficient to stretch it as required by “Step 4.” It takes about $7\frac{1}{2}$ pounds of pull to stretch the tape used by defendant’s machine, and since the tape merely rides over free-running, undriven rollers no such pull is put on the tape [R. 345].

Step 4, it will be noted, requires “stretched condition” for the entire rotation. If argumentatively we assume a “stretched condition” after the free loop is exhausted, such condition is not for the entire “remainder of the periphery”.

Thus, defendant does not employ “Step 4,” and for that additional reason does not infringe claim 1.

It is futile for plaintiffs to assert that merely unwinding the tape from the roll thereof exerts the tension required by the specification, for the specification requires hand stretching for the initial application and for the application while the cans are rotated.

The taping operation of defendant's Dellenbarger machine differs fundamentally from the method of claim 1 of the Paulucci patent. In the Paulucci method the tape is pulled and stretched both before and during application to the cans. In the operation of defendant's machine the tape is not pulled or stretched either prior to or during application to the cans, the tape being merely pressed or "wiped" onto the cans by defendant's applying and buffing rollers. Therefore, defendant's method has an entirely different mode of operation than that of claim 1 of the patent in suit.

Since defendant does not employ steps 2, 3, or 4 of claim 1 in suit, and since defendant's method has an entirely different mode of operation than that of claim 1, defendant does not infringe.

Plaintiff offered no proof of infringement, and did not attempt to rebut defendant's clear proof of non-infringement. Plaintiff relied upon an alleged similarity of appearance of plaintiff's and defendant's products to attempt to show infringement. However, mere similarity of result is not a test of infringement of a method claim.

See:

United States Rubber Co. v. General Tire & Rubber Co., 128 F. 2d 104 (C. C. A. 6th, 1942).

The foregoing demonstrates that Findings of Fact 14 and 15 [R. 85] are clearly erroneous and that defendant does not infringe.

POINT 2.

Claim 1 of the Paulucci Patent in Suit Is Invalid on Its Face for Lack of Invention, Consisting Only of Old and Well Known Steps and Involving Only Simple Mechanical Skill.

The alleged invention of claim 1 of the Paulucci patent in suit was stated by plaintiff's counsel at the trial as follows:

“ . . . the method of the patent in suit, which involves the use of a flexible tape, which is applied to the cans under tension, to the extent that it stretches the tape, so that the tape does not just lie over the flanges of the can, but it follows the contour of the flanges because of the stretch of the tape and the tension, as it is applied, and also goes down and grips the can on each side of the flanges.” [R. 111]

“ . . . the material part of that is using a stretchable tape, and putting that tape under tension, so that the tape stretches as it is applied, and the cans are rolled, so it will adhere around the beads and to the side walls of the can . . . ” [R. 115]

The Paulucci patent in suit teaches, if it teaches anything, that if anyone wants to tape two cans together end-to-end with conventional pressure-sensitive cellophane tape, the sticky tape should be held under tension while it is wrapped onto the cans to make it adhere properly. We suggest that this is known to anyone who has ever used pressure-sensitive cellophane tape to fasten together to objects. It does not require even the skill of a “mechanic” to know and employ this self-evidence procedure. Anyone who has ever tied two parcels together with common string knows that the string must be pulled tight to get a good package. The same is true of sticky tape.

Claim 1 of the Paulucci patent in suit refers to “stretching” the tape before and during application to the cans, merely by applying tension to the tape. Anyone who winds tape onto an object will put tension on the tape or otherwise it cannot be guided on smoothly. The patentee could not define how much tension is required in his method, merely saying that you use enough tension to make the tape go on smoothly and adhere to the cans [R. 59-60, 457-459], pointing out that one can take two cans in one hand and apply the tape with tension and get the same results as his claimed method [R. 62].

The specification states [Column 2, line 53] that the tape should be “slightly stretchable.” The same language appears in Column 3, line 72. In Column 3, lines 49 and 50, it is directed to stretch or pull the tape “between the fingers of the two hands.” The result to be accomplished by this direction is to “conform” the tape to the surface [Column 2, line 53], a purely functional statement. The specification is no more helpful or instructive than to tell a cook to put in his batter enough baking powder to make the cake rise. And, per the file wrapper, this indefiniteness is the exact point of novelty, namely, the application of tape “under strong tension” [R. 571].

Furthermore, it is the only thing which distinguishes the patented method from the plaintiffs’ practice prior to 1951.

The Paulucci patent leaves the question of how much tension to apply to the natural skill of a user. It is obvious that a user would come up with the same result without the Paulucci patent. The defendant independently did so in its hand-taping operations in 1949 (see pp. 8-9, *supra*).

The law is well established that when a patent claim lacks invention on its face, it should be held invalid, without the necessity of referring to any particular prior art.

See:

Towne Steering Wheel Co. v. Lee, 199 Fed. 777
(C. C. A. 9th 1912);

Rasmusson v. National Popsicle Corp., 111 F. 2d
453 (C. C. A. 9th 1940).

The statement of the Supreme Court in *Atlantic Works v. Brady*, 107 U. S. 192, 199, 2 S. Ct. 225, 231, 27 L. Ed. 438, as follows, is particularly apposite to claim 1 of the Paulucci patent here in suit.

“The design of the patent laws is to reward those who make some substantial discovery or invention which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufacturers.”

(Quoted with approval in *Emmett v. Metals Processing Corp.*, 118 F. 2d 796, 798, C. A. 9th.)

Judge Yankwich found [Findings 7 and 12] that the invention of the Paulucci patent resides in causing the tape to pass around an irregular contour to engage the side walls of two abutting cans, as well as the beads thereof, in a stretched condition, “*whereby the tape is extended transversely of its length at an intermediate section.*”

There is not a word in the Paulucci patent or in the evidence that would indicate any *transverse* stretching of the tape. The Paulucci patent teaches that the tape is

pulled lengthwise [Column 3, line 35 to Column 4, line 9], and specifically states that the tape is “tightly stretched *around* the cans [Column 2, lines 18 and 26].” How by pulling lengthwise on a tape it could be stretched *laterally* or *transversely* does not appear in the evidence, is contrary to the plain teaching of the patent, and is contrary to reason. This shows the obvious error in this portion of Findings 7 and 12.

POINT 3.

Claims 1, 2, and 3 Are Invalid Over the Prior Public Use, by Plaintiffs of Their Early Commercial Method and Apparatus.

The plaintiff Paulucci cynically admitted that he and plaintiff Chun King Sales, Inc. had used an apparatus substantially as shown in Fig. 3 of his patent in suit to tape cans together end-to-end starting in May or June, 1949, and continuing until August, 1951, in their extensive public commercial operations during that period (see pp. 6-8, *supra*). The apparatus shown in Fig. 3 of the Paulucci patent is covered by claims 2 and 3 thereof, which were submitted to the Patent Office in Paulucci's original application [R. 566]. As to such apparatus, Paulucci made an *oath* to the effect that such apparatus *had not been in public use* more than one year prior to his application on May 14, 1952 [R. 567]. Such oath obviously was false in view of his own public use of such an apparatus for almost *three* years prior to the filing of his application, and he knew it. We suggest that this was the baldest perjury by Paulucci and that his testimony and plaintiffs' case is thereby completely impeached.

In any event, the only alleged difference between plaintiffs' 1949-1951 taping method and that of claim

1 of the patent in suit was the amount of tension applied to the tape during the taping operation [R. 198-199].* We assert that merely increasing the amount of tension applied to the tape while it is wound on the cans, to obtain a smoother application of the tape, does not rise to the dignity of invention, and that claim 1 is clearly invalid for lack of invention over plaintiffs' own prior art taping method.

It is well established that an alleged invention which involves merely a change in degree from the prior art is not patentable, and any patent covering only such a change in degree is invalid.

See:

Greene Process Metal Co. v. Washington Iron Works, 84 F. 2d 892 (C. C. A. 9th 1936);

Bingham Pump Co. v. Edwards, 118 F. 2d 338 (C. C. A. 9th 1941).

The foregoing shows the clear error in Findings 11, 16, and 24 [R. 84-87].

In addition, it is to be noted that the District Court found in Finding 17 [R. 85] that all prior attempt by plaintiffs proved a failure and were abandoned. This is clearly erroneous because the evidence is uncontroverted that plaintiffs continuously taped thousands of cases of cans of food from June, 1949, until August, 1951, using their original taping method (see pp. 6-8, *supra*). Plaintiffs did not get any rejects of its taped products because the cans were coming apart [R. 404].

*The testimony of Paulucci [R. 199] is as follows:

"Q. Were there any differences in the operation other than the amount of tension applied to the tape? A. Basically, the amount of tension applied to the tape.

Q. That was the only difference? A. Yes, sir."

There is no evidence to support such a finding and it is directly contrary to the evidence.

The method of claim 1 and V-trough apparatus of claims 2 and 3 commercially employed by plaintiffs more than one year prior to Paulucci's filing date cannot validly be patented in the Paulucci patent: see *Pennock v. Dialogue*, 2 Peters (U. S.) 1, 4, 19, 7 L. Ed. 327; *Macbeth-Evans Glass Co. v. General Electric Co.*, 246 Fed. 695 (C. C. A. 6th 1917); and *Metallizing Engineering Co. v. Kenyon Bearing & A. P. Co.*, 153 F. 2d 516, 518-20, and cases there collected (C. C. A. 2d 1946, Opinion by Judge L. Hand).

POINT 4.

Claim 1 Is Invalid Over the Prior Public Use by Defendant of Its Hand-Taping Operation.

Defendant commercially taped over 1,000 cases of cans together end-to-end with sticky cellophane tape from June, 1949, until early in 1950, and resumed such hand-taping in 1954 and has continued to do so until today (see pp. 8-9, *supra*). Defendant's hand-taping operation today does not differ from that used by it in 1949 [R. 469-470]. There is no evidence in this case that any of defendant's hand-taping operations were in any way unsatisfactory. Defendant's present use of such hand-taping and its extensive sales of its hand-taped products is cogent proof of the contrary. This shows the obvious error in Finding 17 [R. 85] to the effect that defendant's hand-taping operations "proved a failure and were abandoned." Physical Exhibit 12 illustrates two of defendant's cans taped together substantially as in its 1949 taping operations [R. 469-470], and it is obviously a satisfactory taping job.

In defendant's 1949 hand-taping operations, tension was put on the tape while it was being wound on the cans, to make it stretch over the beads and onto the side walls of the cans [R. 468-469, 473-475].

If claim 1 of the Paulucci patent in suit is construed broadly enough to cover merely stretching the tape as it is applied to a pair of cans, such method is exactly that commercially used by defendant in 1949 and claim 1 is directly anticipated thereby and is invalid. We suggest, in addition, that even if claim 1 is construed to be limited to the specific steps described therein (as it should be), still such method does not involve any invention over defendant's 1949 hand-taped method and is invalid for that reason.

POINT 5.

Claim 1 of the Paulucci Patent in Suit Is Invalid for Lack of Invention Over the Prior Art Patent to Johnson, DX-S.

If claim 1 of the Paulucci patent in suit is construed broadly enough to cover the defendant's Dellenbarger machine, claim 1 is invalid for lack of invention over and anticipated by the Johnson patent No. 2,652,166 [DX-S, R. 659.]

Defendant's accused Dellenbarger machine was made by the Dellenbarger Machine Company under license from the owner of the Johnson patent (see pp. 12-13, *supra*). Plaintiff by cross-examination of the disinterested technical witness Peterson, established the identity of function and similarity of parts between defendant's accused Dellenbarger machine and the taping machine of the Johnson patent [R. 305-311]. This was confirmed by the engineering expert Johnson [R. 333-334]. (The witness Johnson is not the patentee Johnson.)

It will be remembered that the taping mechanism of the Johnson patent was embodied in the prototype machine which was designed and built by the witness Peterson and tested at the plaintiffs' plant January to April, 1951 (see pp. 13-14, *supra*). Consequently, Peterson had full knowledge of the function and operation of the taping machine of the Johnson patent. Similarly, the witness Johnson had familiarity with such prototype machine [R. 334-335].

The Johnson patent, DX-S, was applied for on May 29, 1950, and long prior to June, 1951, plaintiffs' earliest claimed date of conception of the invention for the Paulucci patent in suit [R. 120]. Consequently, the Johnson patent is prior art as to the Paulucci patent.

See:

Alexander Milburn Co. v. Davis-Bournonville Co.,
270 U. S. 390, 46 S. Ct. 324, 70 L. Ed. 651;

Detrola Radio & Television Corp. v. Hazeltine Corp., 313 U. S. 259, 61 S. Ct. 948, 85 L. Ed. 1319.

Although the Johnson patent describes and claims a taping machine, its operation in applying tape to cans is substantially the same as that of defendant's accused machine, as Peterson and Johnson testified. Consequently, if claim 1 of the Paulucci patent in suit covers the operation of defendant's machine the Johnson patent is a proper basis for finding lack of invention as to method claim 1.

A method claim which covers nothing more than the operation of a machine or of a prior art patent is invalid.

See:

Busch v. Jones, 184 U. S. 598, 22 S. Ct. 511, 46 L. Ed. 707;

United States Consol. Seeded Raisin Co. v. Selma Fruit Co., 195 Fed. 264, 270 (C. C. A. 9th 1912);
McDaniel v. Friedman, 98 F. 2d 745 (C. C. A. 7th 1938).

We concede that the operation of the machine of the Johnson patent, DX-S, would not put enough tension on the tape to stretch it, but, by the same token defendant's accused Dellenbarger machine does not put enough tension on the tape to stretch it. Similarly, we concede that the machine of the Johnson patent does not stretch the tape before its initial application to the cans, but defendant's accused machine likewise does not stretch the tape before initial application to the cans. If claim 1 of the Paulucci patent is construed to be limited to its plain terms, as we suggest it must be, we concede that claim 1 could be valid over the Johnson patent; but if so construed, claim 1 is not infringed by defendant's machine (see pp. 28-35, *supra*). In short, claim 1 of Paulucci cannot be both valid over Johnson, and infringed by a method which utilizes the function and operation of the Johnson patent.

The Johnson patent, DX-S, was not considered by the Patent Office in connection with the application for the Paulucci patent in suit. Consequently, the normal presumption of validity arising from the issuance of the Paulucci patent is greatly weakened if not entirely destroyed.

See:

Gomez v. Granat Bros., 177 F. 2d 266 (C. C. A. 9th 1949);
Jacuzzi Bros., Inc. v. Berkeley Pump Co., 191 F. 2d 632 (C. C. A. 9th 1951).

POINT 6.

Claim 1 of the Paulucci Patent in Suit Is Invalid for Lack of Invention Over the Nifong Patent, DX-K.

The Nifong patent, DX-K [R. 608] likewise was not considered by the Patent Office in connection with the application of the Paulucci patent in suit. Since Nifong is so very pertinent to the subject matter of the patent in suit, it is suggested that if the Patent Office Examiner had found and considered the Nifong patent, he never would have allowed claim 1 of the patent in suit.

The Nifong patent shows and describes a can-taping machine and its method of operation. It is designed primarily to tape the tops onto cans, by wrapping a sticky resilient tape around the juncture of the can and top, by affixing the free end of the tape to the can and top junction; then holding the can and top forcibly together while holding the tape under tension while the can and top are rotated to wind the tape over the junction of can and top, thus securing the top to the body of the can. It obviously could be used to tape two cans together end-to-end. It might involve a slight change in mechanism to substitute a can for the top of can; but there would be no change in method.

The Paulucci patent in suit plainly teaches that if the tape is applied under the required tension it will stretch to conform to the shape of the beads and will extend down onto the side walls of the cans on each side of the bead, as shown in Fig. 2, instead of merely adhering to the beads as shown in Fig. 5 in the absence of such stretching of the tape [Column 4, lines 2 to 35].

In the Nifong patent likewise the tape is put under sufficient tension to conform to the shape of the bead 146 and to extend down smoothly onto the side walls of the can and top. This is clearly shown in Figs. 1, 3,

7, and particularly in Fig. 16 of the Nifong patent, which show the tape 87 conforming to the irregular contour of the bead exactly as shown in Fig. 2 of the Paulucci patent in suit. Consequently, the method of the Nifong patent obtains identically the same result as the method of claim 1 of the Paulucci patent in suit, and does so in exactly the same way, *i.e.*, by holding the tape under tension as it is wound over the can bead and onto the side walls.

The Nifong patent states, page 6, Column 3, lines 26-31:

“Particular attention is called to the fact that the tape 87 having the adhesive thereon is held taut at a substantially uniform tension during the entire revolution of the can, and this aids materially in the proper application of the tape.”

The can in Nifong, with its beaded top and cover, is turned a complete revolution “while contacting the taut tape” [p. 1, Column 1, lines 51-54].

Paulucci also imitates Nifong by a slight over-lapping of the tape. [Compare Column 4, lines 10-13 of Paulucci and p. 6, Column 2, lines 46-48, Nifong].

The District Court obviously did not understand the Nifong patent or its pertinency, dismissing it merely as “an elaborate piece of machinery” [R. 523], and then stating in the Opinion, “There is no method . . . for applying tension to or stretching the tape either before or after application in order to cause it to pass around an irregular contour [R. 68].” In Nifong, as pointed out above, tension is applied to the tape during its application over the bead 146 in order to cause the tape to pass around the irregular contour of the bead and onto the side walls, exactly as in the Paulucci patent in suit. This demonstrates the clear error in the District Court’s Opinion and in Findings 18 and 19 [R. 86].

POINT 7.

Apparatus Claims 2 and 3 Are Invalid for Lack of Invention Over the Prior Art and Are Not Infringed.

Claims 2 and 3 of the Paulucci patent in suit cover merely a V-shaped trough or “angle-iron” and a conventional tape dispenser mounted on a base.

The use of V-shaped troughs to hold cylindrical objects in alignment end-to-end while they are being wrapped together is old in the art, being shown in the Ewart patent No. 2,590,241, Exhibit R [R. 655], in which it serves exactly the same purpose as in the Paulucci patent. The tape dispenser 2 of the Paulucci patent is admitted therein to be of “any desired conventional type” [Column 2, lines 30-31].

Thus, both the V-shaped trough and the tape dispenser shown in the Paulucci patent were separately old and conventional in the prior art, in which they served the same purpose in the same way as they do in the patent in suit. Merely putting them together, as in the Paulucci patent, accomplishes no new function and claims 2 and 3 are obviously invalid as covering mere aggregations of old elements and lacking in invention.

The plaintiffs at the trial in the Court below withdrew its charge of infringement as to claims 2 and 3 [R. 109, 506]. In view of this concession of non-infringement, the only remaining issue as to claims 2 and 3 is as to their validity.

Since apparatus claims 2 and 3 are obviously lacking in invention, we suggest that this Court should decide this issue on this appeal and not remand the case to the District Court on this issue. Such a remand would greatly delay

the final disposition of the case, and, we suggest, justice to the defendant requires an early final decision on this issue. On any such remand, defendant would rely solely on the evidence and facts now before this Court, as to which there is no conflict. This issue involves merely a question of law which can and should be decided by this Court.

See:

Waterloo Min. Co. v. Doe, 82 Fed. 45 (C. C. A. 9th 1897).

The issue as to the validity of claims 2 and 3 having been raised by the plaintiffs' Complaint and by defendant's counterclaim, the District Court should have decided this issue and its failure and refusal to do so is clear error.

See:

Altvater v. Freeman, 319 U. S. 359, 63 S. Ct. 1115, 87 L. Ed. 1450;

Trico Products Corp. v. Anderson Co., 147 F. 2d 721 (C. C. A. 7th 1945);

Dominion Electrical Mfg. Co. v. Wiegand Co., 126 F. 2d 172 (C. C. A. 6th 1942).

However, it would serve no useful purpose to remand the case on the sole issue as to the validity of apparatus claims 2 and 3 of the Paulucci patent, since this Court can decide the legal issue on the present record and appeal.

VI.
CONCLUSION.

Claim 1 of the Paulucci patent in suit is at best a narrow, detailed claim, as limited by its plain terms, by file-wrapper estoppel, by the prior art patents to Johnson and Nifong, and the prior public uses by both plaintiffs and defendant. The method defined by claim 1 has never been used by plaintiffs, defendant, or anyone else, and consequently the Paulucci patent is a mere "paper patent" which has no commercial success and which is not infringed by defendant.

If the plain limitation of claim 1 are ignored and the claim is expanded by interpretation to cover the operation of defendant's Dellenbarger machine, then claim 1 is anticipated by and lacks invention over the prior art patents to Johnson and Nifong, and the prior public uses of both plaintiffs and defendant. In any event, claim 1 defines a method which amounts merely to mechanical skill over the art, and is invalid on its face for lack of invention.

It is respectfully submitted that the judgment of the District Court is clearly erroneous and should be reversed, either on the ground that claim 1 of the Paulucci patent is invalid, or on the ground that if valid it is not infringed by the defendant.

Claims 2 and 3 are also invalid and should be so adjudicated.

Respectfully submitted,

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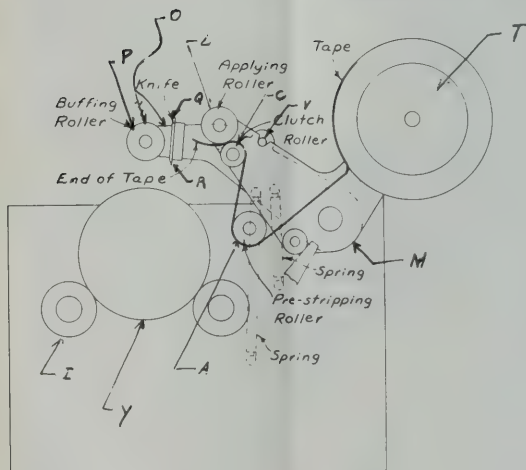
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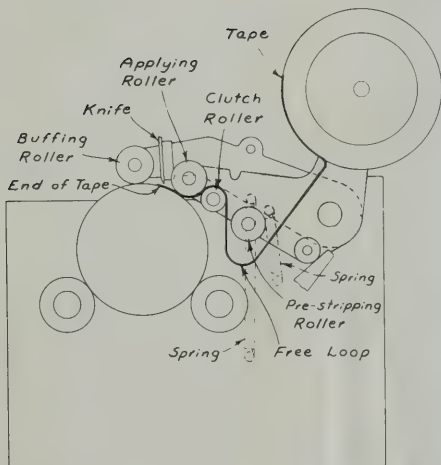
Fig. 1.

Clutch

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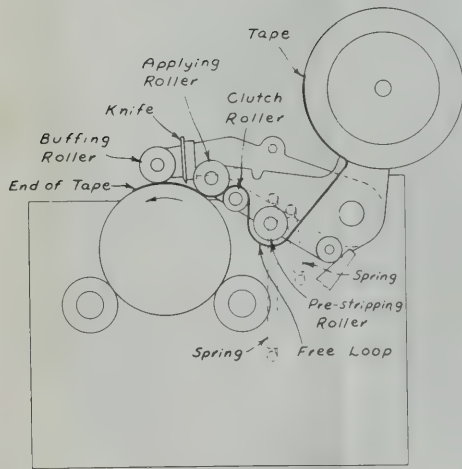
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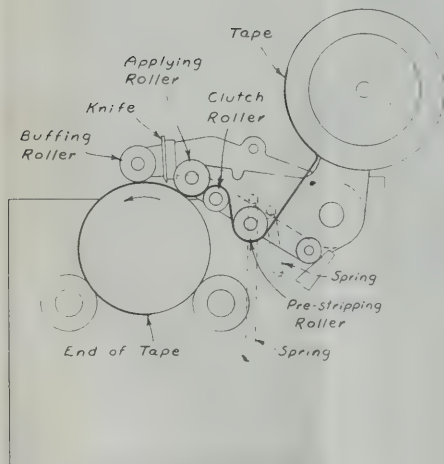
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Fig. 3.



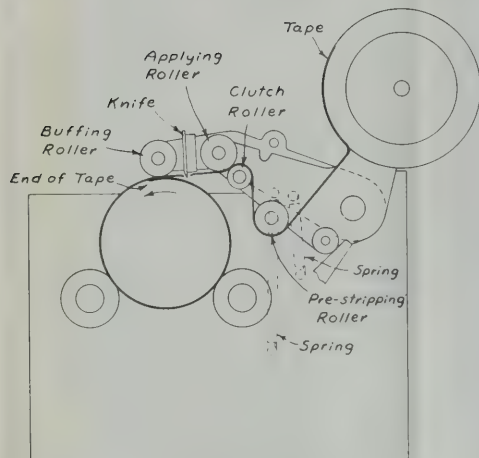
652. *Amundson*
Det
 X3
 X3
 X3

Fig. 4. *Ruef*



17862 ✓
Conley *Owner*
 X4
 NOV 25 1958
 X4
Conley

Fig. 5.



No. 15146

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLIFFORD L. DUKE, JR., LOUIS GLENN BALLARD, and VIC
BUONO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

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FILED

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PAUL P. O'BRIEN, CLERK

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No. 15146
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

CLIFFORD L. DUKE, JR., LOUIS GLENN BALLARD, and VIC
BUONO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

Jurisdiction

The jurisdiction of the District Court in this case arose under Title 18, U. S. C. A., Sec. 371, June 25, 1948, C. 645, 62 Stats. 701; Title 18, U. S. C. A., Sec. 545, June 25, 1948, C. 645, 62 Stat. 716 as amended August 24, 1954, C. 890, Section 1, 68 Stat. 782; September 1, 1954, C. 1213, Title V, Section 507, 68 Stat. 1141; June 30, 1955, C. 258, Section 2(c) 69 Stat. 242; and Title 18, U. S. C. A., Sec. 3231, June 25, 1948, C. 645, 62 Stat. 826.

The jurisdiction of this Court was invoked under the provisions of Title 28, U. S. C. A., Sec. 1291 (June 25, 1948, C. 646, 62 Stat. 929) and Rules 37 and 39 of the Federal Rules of Criminal Procedure, Title 18, U. S. C. A. (as amended December 27, 1948, effective January 1, 1949).

Statement of Case

This case concerns itself with the activities of certain residents of San Diego County, California, in the smuggling of psittacine birds into the United States from the Republic of Mexico. Broadly speaking any bird with a hooked beak is a psittacine bird, such as parrots, parakeets, and the like.

Appellant Clifford L. Duke, Jr. was an attorney in San Diego. Appellant Vic Buono is a bail bondsman in San Diego. Appellant Louis Glenn Ballard resided in the San Diego area and is an electrician. The jury concluded that: Duke was involved with certain of his clients in a general scheme to clandestinely introduce psittacine birds into this country. He introduced one Helm, an aviator, to his clients with the result that Helm entered the conspiracy and commenced to fly psittacine birds from Mexico to remote desert areas of this country where the other members of the band would pick them up and transport them to retail dealers.

After this general scheme had operated for some months there was a falling out among the group whereupon certain members disassociated themselves from the main conspiracy. The others remained in the smuggling operation. Duke remained friendly with both factions but formed a cabal with dissident members of the band to rob or "hi-jack" the remaining smugglers. Appellant Ballard was a member of this crew. Pursuant to this purpose, Duke insinuated Helm into the smuggling operation. Helm as pilot for the smugglers would inform Duke of the time and place of the illicit import. Duke would notify his co-conspirators in this "hi-jack conspiracy," and they would appear at the correct time and place, rob the smugglers of their merchandise, and transport it to their various outlets; after repeated raids by the hi-jackers the smugglers began to get into pre-

carious financial condition. At about the same time a disagreement broke out among the hi-jackers as to the division of spoils, whereupon the hi-jackers dissolved and some of them went into retirement. Appellants Duke and Buono thereupon told certain of the smugglers that the hi-jacking would be stopped so they could continue operations. Accordingly, a third conspiracy was formed toward this end. As it was necessary to have another airplane, appellant Buono arranged with one Appel for a loan to enable Helm to purchase the plane with which to fly the illegal merchandise. In accordance with this plan several illegal loads of psittacine birds were introduced into the country. The foregoing conspectus is specifically supported by the evidence adduced on trial. Most of the evidence against appellants came from their fellow conspirators who testified for the government, viz: (To quote appellant Ballard [Br. p. 7]):

“John W. Hadzima, a twice convicted smuggler, Nicholas A. Spicuzza, a twice convicted smuggler, George Todd, a twice convicted smuggler, Raymond Curtis, convicted smuggler, Robert Helm, convicted smuggler, Mary Asconi, admitted handler of psittacine birds known by her to have been smuggled.”

There follows a resume of the testimony adduced which it is established must be interpreted in a manner most favorable to the government.

Prior to the year 1949 John Hadzima was a poultry dealer in San Diego, California. In the course of his business he brought chickens from Tijuana, Mexico, across the International Boundary into California. [Tr. 698, 700.] He found that it was an easy and profitable matter to insinuate a psittacine bird or two in among his chickens and in this manner illegally import the psittacine birds into the United States. In time this operation became so profitable that it was necessary for him to get help. Accordingly, he

abandoned the poultry business and devoted himself to the importation of parrots on a fulltime basis. Actual importation was usually done by persons walking across the line with packs on their backs. In the parlance of the smuggling trade, such persons are known as "mules."

In 1952, Hadzima formed a smuggling group with Nicholas Spicuzza and George Todd [Tr. 129, 130]. Spicuzza was a childhood friend of Hadzima's, the two having lived within a block of each other in their boyhood days in Chicago [Tr. 128].

Their illicit operation prospered to such an extent that in 1952 they expanded the operation and took in Fred Steiner and organized what was known as the L. A. Pet Exchange, the purpose of which was to smuggle birds into the United States and then distribute them throughout the country [Tr. 130, 1479]. The L. A. Pet Exchange had four partners, John Hadzima, Nicholas Spicuzza, George Todd and Fred Steiner [Tr. 477, 1479]. The actual smuggling was carried on for the Exchange by three "mules" namely, Samuel Segovia, Donald Hamm (Spicuzza's son-in-law) and Chester Vosburg. While other persons may have been used the bulk of the actual importation was borne by these three men.

Early in the year 1952, Hamm and Segovia were apprehended by Customs Agents [Tr. 131]. The latter part of the year Segovia was apprehended again, this time in conjunction with Vosburg [Tr. 132-461]. After the arrest and conviction Hamm on orders from his father-in-law Spicuzza withdrew from the smuggling operation. Segovia who was a citizen of Mexico jumped his bond and became a fugitive from justice [Tr. 132]. Vosburg was then known to Customs and accordingly his utility as a "mule" was destroyed [Tr. 706]. Thus, as of the first part of 1953 those men comprising the L. A. Pet Exchange had lost the services of the three men who had smuggled the

majority of their birds to them. It was at this juncture that appellant Duke entered the picture.

During the latter part of the year 1952 appellant Duke left the staff of the District Attorney of San Diego, County, to go into the private practice of law. Soon after he embarked upon his private practice of law, appellant Duke was retained by certain of the partners in the L. A. Pet Exchange to represent Vosburg who had been apprehended by Customs Agents (*supra*) [Tr. 133]. At the same time that Duke was representing Vosburg he was also representing Robert Helm who had been apprehended by Immigration Officers on a charge of smuggling aliens [Tr. 1032]. Early in 1953 Duke was successful in obtaining an acquittal for Vosburg [Tr. 134, 1479] but within a few days thereafter Helm was convicted and given probation [Tr. 1032]. Following the Vosburg acquittal, Hadzima, Spicuzza and Todd met with Duke in Duke's office relative to retaining Duke to represent them as their attorney in their business dealings [Tr. 134]. At a meeting Duke asked whether they had ever thought of bringing the birds in from Mexico via airplane [Tr. 142, 143, 706, 1482]. This was a fresh proposal and interested the three smugglers who gave it considerable thought during the ensuing weeks. Subsequently, appellant Duke informed his clients (Todd, Spicuzza, Hadzima, etc.) that he also represented a pilot whom he thought might be amenable to entering into a deal with the smugglers to fly psittacine birds into the United States from Mexico [Tr. 707, 1482]. During February, Robert Helm appeared for sentence in the Federal District Court, Southern District of California, Southern Division at San Diego, and was given probation. Immediately following the granting of probation Duke solicited Helm to meet with his clients relative to the idea that Helm would fly birds into the country for them [Tr. 1036, 1037]. Duke instructed Helm to ask \$5,000 a load for his services [Tr. 146, 1036, 734, 1485]. Duke then told the smugglers that

he thought he could obtain Helm's services for some figure in the neighborhood of \$1500 a load [Tr. 736, 146, 1485]. After sundry meetings an agreement was reached whereby Helm agreed to fly birds in for certain of the smugglers.

At about the same time Hadzima had a falling out with Spicuzza and Todd in that he felt Spicuzza was cheating him out of certain of the proceeds of their business. As the operation was carried out Hadzima would normally go to Europe to arrange for birds to be shipped to Mexico. Spicuzza and Todd would handle the collection and facilitate the transportation of the birds in Mexico City. They would then arrange to have the birds flown to a remote spot below the border in Mexico where they would be held until a propitious time arose to introduce them into the United States [Tr. 158, 709]. It was Hadzima's feeling that Spicuzza was in effect short-changing him on the birds as they passed through Mexico City [Tr. 709]. Hadzima made known his proposed split to Duke who advised him that the venture was profitable and that he should not openly break with Spicuzza [Tr. 710]. Hadzima acting on Duke's advice superficially maintained his status with Spicuzza but in order to recoup the money that he felt had been withheld from him by Spicuzza he arranged to have a load of Spicuzza's birds hi-jacked during the early part of February, 1953 [Tr. 137, 710, 711, 719, 723]. Subsequently, early in March a second hi-jacking occurred in which one of the employees of the L. A. Pet Exchange, George Monolias was badly beaten [Tr. 149, 150, 1493, 739, 740, 765, 766]. Following the March hi-jacking, Hadzima openly split with Spicuzza and Todd [Tr. 153, 773, 775, 776, 1501]. It was this second hi-jacking which prompted Spicuzza and Todd to contact Helm with the idea of obtaining his services to fly the birds into the country. Accordingly, Spicuzza and Todd contacted Duke and asked Duke how they would go about getting in touch with Helm [Tr. 153, 1503, 1504]. Duke gave Spicuzza Helm's telephone number and Todd

and Spicuzza called him at his home and arranged an interview [Tr. 153]. At this interview it was finally decided that Helm would fly psittacine birds from Mexico into the United States and would be paid in excess of \$1,000 a flight by Spicuzza and Todd [Tr. 154, 1505]. It was necessary for Helm to get an airplane so accordingly, Spicuzza and Todd gave him about \$2,000 in order that he might go to Oregon and pick up the plane he had in mind [Tr. 154, 155, 1505, 1045]. Helm was somewhat indefinite in his plans so it was arranged between Helm, Spicuzza and Todd that when Helm returned from Oregon he would contact Duke who would in turn contact Spicuzza who would proceed to the agreed rendezvous [Tr. 155, 1505]. This plan was carried out [Tr. 155, 156, 1506].

The first load to be imported under this new scheme of operation was to come in to Apple Valley, California about the first of April, 1953 [Tr. 157, 158, 160, 161, 1049, 1050, 1508, 1521]. Helm acting on instructions from Duke was to report to Duke all arrangements having to do with the time of arrival of the load in the United States [Tr. 1041, 1049, 780]. Duke then in accordance with his agreement with Hadzima and the other hi-jackers passed the information on to Hadzima [Tr. 779]. Pursuant to the information that the load was due in Apple Valley, Hadzima in the company of appellant Ballard and one Purselley proceeded to Apple Valley [Tr. 780]. Due to some inadvertence they missed contact with the smugglers there and missed hi-jacking the load. Up to this time Helm had known nothing of the plans to hi-jack Spicuzza and Todd. However, he was informed of the plan at a meeting at which appellant Duke and appellant Buono were present. At that time he was told that he would continue to cooperate with them [Tr. 1054, 785, 786].

The next load to be brought into the country by Spicuzza and Todd was to be taken by Helm to Bowling Green, Kentucky. Helm was to pick the birds up in the eastern part of

of Mexico [Tr. 176, 180, 1061] and fly them from there to Bowling Green [Tr. 175, 177, 782, 787, 1061]. Spicuzza left San Diego and went East to await the arrival of the birds. Helm developed plane trouble in El Paso, Texas, and was not able to carry out the plan. At this point Helm telephoned Duke in San Diego to ask him instructions [Tr. 1062, 1064]. Duke directed Hadzima to go to El Paso to straighten things out [Tr. 804]. Hadzima in turn called appellant Ballard and one Pursselley and directed them to proceed to El Paso and meet him there [Tr. 805, 806, 807]. As a result of these meetings, Helm contacted Spicuzza and told him that he would not be able to bring the load into Bowling Green, Kentucky, as planned. Helm then returned to California.

Subsequently, Spicuzza and Helm met in Las Vegas in the company of one Ray Curtis, a bird dealer from Ohio [Tr. 189, 576, 1075]. On the way from Las Vegas to Los Angeles Helm and Spicuzza agreed that the next load of birds should come into Desert Center, California, on May 12, 1953 [Tr. 190, 1075]. This bit of information was conveyed by Helm to Duke [Tr. 810]. Inasmuch as time was too short to organize a successful hi-jack, Helm was requested to stall a day which he did [Tr. 1078]. Spicuzza and Curtis rented a truck in Los Angeles and proceeded to drive to Desert Center to pick up the birds [Tr. 193, 576, 577]. Upon arrival at the airstrip outside of Desert Center, Spicuzza and Curtis waited for Helm to appear [Tr. 195, 578]. As heretofore stated Helm stalled a day and as a result did not arrive at Desert Center until the evening of the second day. At that time the birds were unloaded from the plane and placed in some weeds at the side of the field. Since the hi-jackers had not yet appeared Helm felt impelled to stall pending their arrival. Accordingly, he dropped his billfold on the ground and then requested the help of Spicuzza and Curtis to help him find the papers which blew loose from the billfold [Tr. 200, 581, 1083]. While engaged in this search,

Curtis and Spicuzza were surprised by the hi-jackers viz: Ballard, Hadzima and Pursselley who appeared upon the scene and at gun point forced Spicuzza and Curtis to submit to being bound [Tr. 201, 583, 585, 1086]. After binding Spicuzza appellant Ballard hit him in the head with the butt of a 45 automatic and kicked him about the head and body [Tr. 201, 203, 206, 587, 590]. Ballard, Pursselley and Hadzima then loaded the birds into a truck and returned to Burbank, California, where they transported the birds to an aviary belonging to Mary Ascani. Mary Ascani sold the birds piecemeal and turned the proceeds over to Pursselley [Tr. 1089, 1091, 1764, 1751, 1763, 1767]. Pursuant to agreement the profits from the hi-jacking were to be divided amongst the conspirators including appellant Duke and appellant Ballard. Sometime after the hi-jacking, appellant Duke expressed concern about the fact that he had not received his cut of the proceeds [Tr. 818]. At this time Hadzima drove Buono and Duke to Burbank, California, where they could inspect the birds at the aviary of Mary Ascani in order that Duke might be satisfied that he was not being cheated [Tr. 818, 819, 822]. A few days thereafter Roy Pursselley picked up Helm in Los Angeles and in his company drove to San Diego where he was to pay Duke his share of the proceeds [Tr. 1089]. Pursselley had lost \$500 of the money gambling in Gardena, California, and as a result was \$500 short in his pay-off [Tr. 1090]. Duke complained to Hadzima and as a result of an investigation conducted by Hadzima the additional \$500 difference was made up by Hadzima and Ballard to Duke [Tr. 831, 832, 835, 836]. At about the same time final distribution was made of the proceeds of the Desert Center hi-jack. Both Ballard and Duke received their share [Tr. 1091, 840].

At this point a split occurred in the hi-jacking conspiracy due to Pursselley's shortcomings with the money. A segment of the old hi-jacking conspiracy continued on

from which Duke was to get ten per cent from the proceeds from all the birds brought into the United States by Hadzima and Ballard [Tr. 841, 843].

Ultimately, the agreed division was 45% to Hadzima, 45% to Ballard and the remaining 10% to Duke [Tr. 843, 855, 857].

Helm objected to continuing in the hi-jacking racket and so notified Duke and Buono [Tr. 1100]. They asked Helm whether he wouldn't prefer to continue in business himself as a bird smuggler [Tr. 1101]. Helm said he thought he might be able to but he would need a new airplane since his old plane was well-known to the Customs men [Tr. 1100]. A few days later a meeting was had between Duke, Buono, Helm, Spicuzza and Todd (the latter two were still trying to smuggle birds) [Tr. 220, 221, 1532, 1105]. At this point Buono informed the group that it would be possible to stop the hi-jacking so that business might continue as formerly [Tr. 222, 223, 1106, 1534]. He further stated that he thought he could get the necessary funds to enable the venture to get started, and get Helm an airplane [Tr. 221]. He proposed to arrange a loan from his boss in Los Angeles, a man by the name of Albert Appel [Tr. 221]. As a result of this conversation, Duke Buono and Helm all went to Appel's home in Los Angeles and discussed the matter of the airplane loan [Tr. 1104]. Shortly thereafter Appel agreed to loan Buono \$2500. A check in that sum arrived at Buono's office, was endorsed by him and given to Helm who in turn took it to the oil company that owned the airplane and bought the airplane [Tr. 1107]. Subsequently, both Duke and Buono were taken for an airplane ride in the new airplane by Helm [Tr. 1107]. Pursuant to the new or "airplane" conspiracy, Helm flew a load of birds from Carbo (near Hermosillo), Mexico, to the United States [Tr. 228, 1540, 1541]. To finance this trip appellant Buono had advanced over \$200 [Tr. 225, 232, 1537].

Subsequent loads were taken from Mexico to Las Vegas, Nevada, where they were held in the aviary of one Robert Crapella [Tr. 239, 240, 243, 247, 1545]. As a result of these latter loads, appellant Buono was repaid his \$2500 [Tr. 241, 242, 1546, 1549]. The repayment of the \$2500 left Spicuzza short on cash whereupon Buono upon being informed of his problem loaned him another \$600 to buy a load of birds [Tr. 246].

As a result of these activities appellants Duke, Ballard and Buono were indicted by the Federal Grand Jury on May 25, 1955. After an extended trial they were convicted as charged with the exception of Buono who was acquitted on Counts IV, V and VI. On September 30, 1955 they were sentenced, Ballard to a total period of imprisonment of nine years, Buono to pay a fine, and Duke to a total period of imprisonment of eleven years. From the judgment of conviction the instant appeal is brought.

The Indictment.

Appellants were charged in a ten-count indictment which was returned May 25, 1955. While it is contained at page 2 through 13, inclusive, of the Clerk's Transcript in view of the repeated references thereto, it is reproduced in full at this point:

COUNT ONE.

(U. S. C., Title 18, Sec. 371.)

Commencing on or about January, 1953, and continuing to April, 1953, in San Diego and Imperial Counties, California, within the Southern Division of the Southern District of California, defendant CLIFFORD L. DUKE, JR., did wilfully and unlawfully conspire and agree with Fred W. Steiner, Nicholas Spicuzza, Olive Spicuzza, John W. Hadzima, Chester W. Vosburg, Charles Walker, George Todd, Roy Pursselley, George Monolias, Samuel Segovia, Don-

ald F. Hamm, Edward V. Ling, and Robert Helm, named as co-conspirators but not as defendants herein, and with other persons to the grand jury unknown to commit offenses against the United States of America, in violation of United States Code, Title 18, Sections 371 and 545, in that defendant CLIFFORD L. DUKE, JR., and the said co-conspirators did conspire and agree together and with each other as follows:

The defendant CLIFFORD L. DUKE, JR., said co-conspirators, and other persons to the grand jury unknown would knowingly and wilfully and with intent to defraud the United States smuggle and clandestinely introduce into the United States merchandise, namely: various and sundry kinds of psittacine birds, from a foreign country, namely: the Republic of Mexico, which merchandise should have been invoiced;

The defendant CLIFFORD L. DUKE, JR., said co-conspirators, and other persons to the grand jury unknown would knowingly and fraudulently import and bring into the United States of America from a foreign country, namely: Mexico, said merchandise, contrary to United States Code, Title 19, Chapter 4 and particularly Sections 1461 and 1484 thereof;

The defendant CLIFFORD L. DUKE, JR., said co-conspirators, and other persons to the grand jury unknown would knowingly and wilfully receive, conceal, sell, and facilitate the transportation and concealment of said merchandise, which said merchandise was unlawfully imported and brought into the United States contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof, knowing said merchandise would be, and was, so imported and brought into the United States;

Pursuant to said conspiracy and to effect the objects thereof, the defendant and said co-conspirators did commit divers overt acts in San Diego and Imperial Counties, California, both within the Southern Division of the Southern District of California, and in other places to the grand jury unknown, among which are the following:

(1) On or about March 1, 1953, in San Diego, California, the defendant CLIFFORD L. DUKE, JR., made a telephone call to Robert Helm;

(2) On or about March 1, 1953, in San Diego, California, defendant CLIFFORD L. DUKE, JR., introduced Robert Helm to John Hadzima, Nicholas Spicuzza, George Todd, and others at the office of defendant CLIFFORD L. DUKE, JR.;

(3) On or about March 28, 1953, in San Diego, California, defendant CLIFFORD L. DUKE, JR., received a telegram from Robert Helm;

(4) On or about March 28, 1953, Robert Helm met with Nicholas Spicuzza, George Todd, John Hadzima, and others and examined and measured the interior of a Grumman amphibian airplane;

(5) On or about April 1, 1953, Robert Helm flew approximately thirty crates of various and sundry psittacine birds, the exact amount being unknown to the grand jury, from Lago Chapella, Baja California, Mexico, to Apple Valley, California, in said Grumman amphibian airplane; and

(6) During the month of May, 1953, defendant CLIFFORD L. DUKE, JR., received the sum of \$700.00 cash from said co-conspirators.

COUNT TWO.

(U. S. C., Title 18, Sec. 545.)

On or about April 1, 1953, in Imperial County, California, in the Southern Division of the Southern District of California, defendant CLIFFORD L. DUKE, JR., did knowingly and wilfully, with intent to defraud the United States, smuggle and clandestinely introduce into the United States from a foreign country, namely: Mexico, certain merchandise, namely: approximately thirty crates of birds of the psittacine family, which merchandise should have been invoiced, and did fraudulently and knowingly import and bring into the United States from a foreign country, namely: The Republic of Mexico, said merchandise contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484.

COUNT THREE.

(U. S. C., Title 18, Sec. 545.)

On or about April 1, 1953, in San Bernardino County, California, within the Southern District of California, defendant CLIFFORD L. DUKE, JR., did knowingly receive, conceal, and facilitate the transportation and concealment of certain merchandise, namely: approximately thirty crates of birds of the psittacine family, which said merchandise, as the defendant then and there well knew, theretofore had been imported and brought into the United States contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof.

COUNT FOUR.

(U. S. C., Title 18, Sec. 371.)

Commencing on or about April, 1953, and continuing to December, 1954, in San Diego, Riverside and Imperial Counties, California, within the Southern District of California, defendants CLIFFORD L. DUKE, JR., LOUIS GLEN BALLARD, and VIC BUONO did wilfully and unlawfully conspire and agree with each other and with John W. Hadzima, Phyllis Hadzima, Mary Ascani, Roy Pursselley, and Robert Helm, named as co-conspirators but not as defendants herein, and with other persons to the grand jury unknown, to commit offenses against the United States of America in violation of United States Code, Title 18, Sections 371 and 545, in that defendants CLIFFORD L. DUKE, JR., LOUIS GLEN BALLARD, and VIC BUONO and said co-conspirators did conspire and agree together and with each other as follows:

The defendants, said co-conspirators, and other persons to the grand jury unknown would knowingly and wilfully and with intent to defraud the United States smuggle and clandestinely introduce into the United States merchandise, namely: various and sundry kinds of psittacine birds, from a foreign country, namely: the Republic of Mexico, which merchandise should have been invoiced;

The defendants, said co-conspirators, and other persons to the grand jury unknown would knowingly and fraudulently import and bring into the United States of America from a foreign country, namely: Mexico, said merchandise contrary to United States Code, Title 19, Chapter 4, and specifically Sections 1461 and 1484;

The defendants, said co-conspirators, and other persons to the grand jury unknown would knowingly

and wilfully receive, conceal, sell, and facilitate the transportation and concealment of said merchandise, which said merchandise was unlawfully imported and brought into the United States contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof, knowing said merchandise would be, and was, so imported and brought into the United States;

Pursuant to said conspiracy and to effect the objects thereof, the defendants, said co-conspirators, and other persons to the grand jury unknown did commit divers overt acts in San Diego, Riverside, and Imperial Counties, California, within the Southern District of California, and in other places to the grand jury unknown, among which are the following:

(1) During the month of April, 1953, in San Diego County, a conversation was had in the office of defendant VIC BUONO by and between defendants VIC BUONO and CLIFFORD L. DUKE, JR., and unindicted co-conspirators John Hadzima and Robert Helm and others to the grand jury unknown;

(2) During the month of May, 1953, in San Diego County, a conversation was had in the office of defendant VIC BUONO by and between defendants VIC BUONO, CLIFFORD L. DUKE, JR., and the unindicted co-conspirators John Hadzima, Robert Helm, and others to the grand jury unknown;

(3) On or about May 13, 1953, a load of birds of the psittacine family was flown from Baja California, Mexico, to Desert Center, California;

(4) On or about May 13, 1953, defendant LOUIS GLEN BALLARD and co-conspirators Roy Pursselley and John Hadzima transported various psittacine birds from Desert Center, California, to the aviary of Mary Ascani in Burbank, California;

(5) On or about June 1, 1953, defendants CLIFFORD L. DUKE, JR., and VIC BUONO observed various psittacine birds at the aviary of Mary Ascani, Burbank, California;

(6) During the month of June, 1953, defendant CLIFFORD L. DUKE, JR., received approximately \$3,000.00 in cash; and

(7) During the month of June, 1953, defendant VIC BUONO received approximately \$1,500.00 in cash.

COUNT FIVE.

(U. S. C., Title 18, Sec. 545.)

On or about May 13, 1953, in Imperial County, California, in the Southern Division of the Southern District of California, defendants CLIFFORD L. DUKE, JR., LOUIS GLEN BALLARD, and VIC BUONO did knowingly and wilfully, with intent to defraud the United States, smuggle and clandestinely introduce into the United States from a foreign country, namely: Mexico, certain merchandise, namely: thirty crates of birds of the psittacine family, which merchandise should have been invoiced, and did fraudulently and knowingly import and bring into the United States from a foreign country, namely: the Republic of Mexico, said merchandise contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484.

COUNT SIX.

(U. S. C., Title 18, Sec. 545.)

On or about May 13, 1953, in Imperial and Riverside Counties, California, within the Southern District of California, defendants CLIFFORD L. DUKE, JR., LOUIS GLEN BALLARD, and VIC BUONO did knowingly receive, conceal, and facilitate the transportation and concealment of certain merchandise, namely: approximately thirty crates of birds of the psittacine

family, which said merchandise, as the defendants then and there well knew, theretofore had been imported and brought into the United States contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof.

COUNT SEVEN.

(U. S. C., Title 18, Sec. 371.)

Commencing on or about June 1, 1953, and continuing to on or about October 31, 1953, in San Diego, Imperial, and Los Angeles Counties, California, in the Southern District of California, defendants CLIFFORD L. DUKE, JR., and VIC BUONO did wilfully and unlawfully conspire and agree with each other and Robert Helm, Nicholas Spicuzza, George Todd, and Albert W. Appel, named as co-conspirators but not as defendants herein, and with other persons to the grand jury unknown to commit offenses against the United States of America in violation of United States Code, Title 18, Sections 371 and 545 in that defendants CLIFFORD L. DUKE, JR., and VIC BUONO and the said co-conspirators did conspire and agree together and with each other as follows:

The defendants, said co-conspirators, and other persons to the grand jury unknown would knowingly and wilfully and with intent to defraud the United States smuggle and clandestinely introduce into the United States merchandise, namely: various and sundry kinds of psittacine birds, from a foreign country, namely: Mexico, which merchandise should have been invoiced;

The defendants, said co-conspirators, and other persons to the grand jury unknown would knowingly and fraudulently import and bring into the United States of America from a foreign country, namely: Mexico said merchandise contrary to United States Code, Title 19, Chapter 4, and specifically Sections 1461 and 1484;

The defendants, said co-conspirators, and other persons to the grand jury unknown would knowingly and wilfully receive, conceal, sell, and facilitate the transportation and concealment of said merchandise, which said merchandise was unlawfully imported and brought into the United States contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof, knowing said merchandise would be, and was, so imported and brought into the United States;

Pursuant to said conspiracy and to effect the objects thereof, the defendants, said co-conspirators, and other persons to the grand jury unknown did commit divers overt acts in San Diego, Imperial, and Los Angeles Counties, California, within the Southern District of California and in other places to the grand jury unknown, among which are the following:

(1) On or about June 1, 1953, a conversation was had in the office of the defendant VIC BUONO in San Diego, California, by and between the defendants VIC BUONO and CLIFFORD L. DUKE, JR., and the co-conspirators Nicholas Spicuzza, George Todd, and Robert Helm;

(2) On or about June 10, 1953, the defendant VIC BUONO endorsed a check drawn by Albert W. Appel in the sum of \$2,500.00;

(3) On or about June 10, 1953, a Cessna aircraft was purchased;

(4) On or about June 15, 1953, defendants VIC BUONO and CLIFFORD L. DUKE, JR., flew in a Cessna aircraft;

(5) On or about June 25, 1953, Robert Helm flew various and sundry psittacine birds from the Republic of Mexico into the United States to a point within the Southern District of California in a Cessna aircraft; and

(6) On or about September 28, 1953, Robert Helm flew various and sundry psittacine birds from the Republic of Mexico into the United States to a point within the Southern District of California in a Cessna aircraft.

COUNT EIGHT.

(U. S. C., Title 18, Sec. 545.)

On or about June 25, 1953, in Imperial County, California, in the Southern Division of the Southern District of California, defendants CLIFFORD L. DUKE, JR., and VIC BUONO did knowingly and wilfully, with intent to defraud the United States, smuggle and clandestinely introduce into the United States from a foreign country, namely: the Republic of Mexico, certain merchandise, namely: various and sundry birds of the psittacine family, which merchandise should have been invoiced, and did fraudulently and knowingly import and bring into the United States from a foreign country, namely: Mexico, said merchandise contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484.

COUNT NINE.

(U. S. C., Title 18, Sec. 545.)

On or about August 28, 1953, in Imperial County, California, in the Southern Division of the Southern District of California, defendants CLIFFORD L. DUKE, JR., and VIC BUONO did knowingly and wilfully, with intent to defraud the United States, smuggle and clandestinely introduce into the United States from a foreign country, namely: Mexico, certain merchandise, namely various and sundry birds of the psittacine family, which merchandise should have been invoiced, and did fraudulently and knowingly import and bring into the United States from a foreign country, namely: Mexico, said merchandise contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484.

COUNT TEN.

(U. S. C., Title 18, Sec. 545.)

On or about September 28, 1953, in Imperial County, California, in the Southern Division of the Southern District of California, defendants CLIFFORD L. DUKE, JR., and VIC BUONO did knowingly and wilfully, with intent to defraud the United States, smuggle and clandestinely introduce into the United States from a foreign country, namely: Mexico, certain merchandise, namely: various and sundry birds of the psittacine family, which merchandise should have been invoiced, and did fraudulently and knowingly import and bring into the United States from a foreign country, namely: Mexico, said merchandise contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484.

It will be noted that the counts fall into three categories, viz: Counts I, IV and VII are the conspiracy counts setting forth the three separate conspiracies here involved. Counts II, V, VIII, IX and X are smuggling counts, respectively, charging the appropriate appellants with smuggling and clandestinely introducing psittacine birds into the United States from the Republic of Mexico. Counts III and VI are receiving and facilitating counts each charging the appropriate appellants with knowingly receiving, concealing and facilitating the transportation and concealment of certain psittacine birds after illegal importation into the United States. Appellant Duke was charged in all counts, I through X. Appellant Ballard was charged in Counts IV (conspiracy), V (smuggling) and VI (receiving and facilitating). Appellant Buono was charged in Counts IV (conspiracy), V (smuggling), VI (receiving and facilitating), VII (conspiracy), VIII (smuggling), IX (smuggling) and X (smuggling). On trial Appellants Duke and Ballard were found guilty as charged [Tr. 311, 306]. Appellant Buono was found guilty on Counts VII, VIII, IX and X, and acquitted on Counts IV, V and VI [Tr. 308].

ARGUMENT.

QUESTIONS JOINTLY RAISED.

Appellants Were Properly Tried and Sentenced for Violations of 18 U. S. C. A., Sec. 545, Where the Evidence Showed That the Objects, the Importation of Which Was Charged, Were Psittacine Birds.

Since this ground is urged with but minor variations by all three appellants, it will, in the interest of expediency, be treated in its entirety at this point. Additionally, while the following discussion will deal with the substantive counts of the indictment, the same arguments are controlling as to the conspiracy counts.

All three appellants take the position that they cannot properly and lawfully be convicted of violations of 18 U. S. C. A., Sec. 545, where the evidence shows that the wrongfully imported objects were psittacine birds. 18 U. S. C. A., Sec. 545, is the general smuggling statute and provides as follows:

“Sec. 545. Smuggling goods into the United States

“Whoever knowingly and wilfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which would have been invoiced, or makes out or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or uttered document or paper; or

“Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

“Shall be fined not more than \$5,000 or imprisoned not more than two years, or both.

“Proof of defendant’s possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this statute. . . . June 25, 1948 c. 645, 62 Stats. 716.”

A conviction under this statute is a felony.

The argument is made that appellants’ activities in the smuggling of psittacine birds constitutes a violation, not of the felony statute 18 U. S. C. A., Sec. 545, *supra*, but rather of a misdemeanor health and safety regulation promulgated by the Surgeon General under authority of 42 U. S. C. A., Sec. 264. This last statute provides in applicable portion:

“(a) The Surgeon General, with the approval of the Administrator, is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.”

Pursuant to this statute, 42 C. F. R., Sec. 71.152(b) provides:

“Except as provided in subparagraphs (1) and (2) of this paragraph, psittacine birds shall not be brought

into the continental United States, its territories, or possessions, other than the Canal Zone, from any foreign port.”

The penal provision which makes violation of the above regulation a misdemeanor is found in 42 U. S. C. A., Sec. 271(a) viz:

“(a) Any person who violates any regulation prescribed under sections 264-266 of this Title, or any provision of section 269 of this Title or any regulation prescribed thereunder, or who enters or departs from the limits of any quarantine station, ground, or anchorage in disregard of quarantine rules and regulations or without permission of the quarantine officer in charge, shall be punished by a fine of not more than \$1,000 or by imprisonment for not more than one year, or both.”

The two-fold argument is advanced by appellants that the evidence upon which the convictions are based shows commission of misdemeanors under 42 U. S. C. A., Sec. 271(a), *supra*, because (1) the Surgeon General by promulgating 42 C. F. R., 71.152(b) made 42 U. S. C. A., Sec. 271(a) exclusively applicable to the importation of psittacine birds, thus removing such importation from the prohibitions of the general smuggling statute (18 U. S. C. A., Sec. 545, *supra*) or, (2) in the event the foregoing result was not worked by the adoption of 42 C. F. R., 71.152(b) both 18 U. S. C. A., Sec. 545 and 42 U. S. C. A., Sec. 271(a) were applicable to the violations at bar. In this latter state of facts, it is contended that violation of neither applicable statute could be proved without proving violation of the other and accordingly, it is claimed prosecution in such a case must always be for the offense carrying the lesser penalty.

As an additional ground appellant Ballard applies to the same argument the provisions of 18 U. S. C. A., Sec. 42 and Sec. 43 which provide in part:

“Sec. 42. Importation of injurious animals and birds; permits; specimens for museum.

“(a) The importation into the United States or any territory or district thereof, of the Mongoose, the so-called Flying Foxes, or Fruit Bats, the English Sparrow, the Starling, and such other birds and animals as the Secretary of the Interior may declare to be injurious to the interests of agriculture or horticulture, is prohibited; and all such birds and animals shall upon arrival at any port of the United States, be destroyed or returned at the expense of the owner. Nothing in this subsection shall restrict the importation of natural history specimens for museums or scientific collections, *or of certain cage birds, such as domesticated canaries, parrots*, or such other birds as the Secretary of the Interior may designate. The Secretary of the Treasury may make regulations for carrying into effect the provisions of this section.

“(b) Whoever violates this section shall be fined not more than \$500 or imprisoned not more than six months, or both.” (Emphasis added.)

Section 42 of Title 18 provides a \$500 fine and imprisonment of not more than six months or both for the transportation or importation in violation of State, National and Foreign laws of certain prohibited animals or birds.

It is admitted by appellants that these arguments have been adversely determined to their contentions by this Honorable Court in *Steiner v. United States* (1956, 9th Cir.), 229 F. 2d 745, a case involving many of the co-

conspirators of these appellants, wherein Judge Mathews stated at page 749:

“Appellants were sentenced on Count One under and in conformity with the first paragraph of 18 U. S. C. A., Sec. 371. Steiner, Spicuzza, Walker and Pursselley contend that the offenses the commission of which was the object to the conspiracy charged in Count One were misdemeanors only, namely violations of a regulation, 42 C. F. R., 71.152(b) prescribed by the Surgeon General of the United States under 42 U. S. C. A., Sec. 264 and punishable under 42 U. S. C. A., Sec. 271(a), and that therefore, if sentenced at all on Count One, appellants should have been sentenced under and in conformity with the second paragraph of 18 U. S. C. A. There is no merit in these contentions. Nor is there any merit in Hadzima’s contention that the offenses, the commission of which was the object of the conspiracy charged in Count One were punishable under 18 U. S. C. A., Secs. 42 and 43 and under 42 U. S. C. A., Sec. 271(a). Obviously, they were punishable under 18 U. S. C. A., Sec. 545, and hence were felonies.”

In *Murray v. United States* (1954, 9th Cir.), 217 F. 2d 583, the same argument was rejected by this Court in considering an appeal from a denial of a motion to correct sentence under 28 U. S. C. A., Sec. 2255. Judge Fee stated:

“It is doubted that a mere police rule so motivated could dominate the field to the exclusion of express criminal statutes. In any event, no penalty is provided for importations specifically, and the authority is in an omnibus section of a general act which fixes penalties for violation of such regulations in general terms.”

The opinion then went on to comment:

“It would not in any event have repealed the provisions of the statute directed against smuggling, which was passed in its present form in 1948 and fixes a definite penalty for such acts. The latter supersedes all prior statutes *and overrules the regulations no matter when adopted*. Callahan v. United States, 285 U. S. 515, 52 S. Ct. 454, 76 L. Ed. 914.”

The absurdity of appellants' contentions becomes clear when it is considered that under the construction advanced any specific Congressional enactment could at any time be repealed, superseded, or modified by the issuance of a regulation at the agency level. It is submitted that the arguments of appellants on this point are definitely determined by the *Murray* and *Steiner* opinions, *supra*.

However, appellants now urge, since the opinion of this Court in *Steiner*, *supra*, the United States Supreme Court has decided *Berra v. United States* (1956), 351 U. S. 131, an opinion which it is claimed should cause a reconsideration by this Court of the position taken in the *Steiner* opinion. Appellants' argument is apparently founded not on the *Berra* opinion itself but upon the dissent in which Justices Black and Douglas indicated that where there are overlapping statutes under which a defendant may be tried, the Government has no election but to prosecute under the statute prescribing the lesser penalty. It is the position of the appellee in the instant case that such a contention is untenable and erroneous under the Federal cases.

Berra v. United States, *supra*, was a case out of the Eastern District of Missouri, Eastern Division, concerning wilful attempted evasion of income taxes under Section 145(b) of the Internal Revenue Code of 1939. The issue in that case which has tangential applicability to the issue here under discussion, was Berra's contention that he should have been prosecuted under the misdemeanor Sec-

tion 3616(a) of the Internal Revenue Code rather than under the felony Section 145(b). As stated on page three of his subsequent "Motion to Correct Sentence" his contention was "the election urged by the Government to prosecute either for the felony or the misdemeanor does not exist, thus this Court is permitted only to pronounce the less harsh sentence." It was with this stand that Justices Black and Douglas acquiesced in their dissenting opinion, but the fact is that that opinion treats questions that were only partially briefed and argued. The only question before the Supreme Court was whether the trial court erred in refusing to submit to the jury an instruction requested by defendant under which the jury could have convicted him of the misdemeanor prescribed by Section 3616(a). The Supreme Court held, seven to two, that the trial court correctly refused to do so, and did not attempt to decide whatever other questions might have been raised by the assumed overlapping of Sections 145(b) and 3616(a).

The Criminal Statutes of the United States are not like a jigsaw puzzle in which all the pieces neatly interlock, with no gaps or laps. Many statutes do overlap, and it is not at all uncommon for a single act or transaction to violate more than one provision.

United States v. Beacon Brass Co., 344 U. S. 43, 45;

United States v. Gilliland, 312 U. S. 86, 95-96;

Blockburger v. United States, 284 U. S. 299, 304;

United States v. Noveck, 273 U. S. 202, 206-207;

Albrecht v. United States, 273 U. S. 1, 11.

Where there are two statutes proscribing the same conduct, "the rule is to give effect to both if possible."

United States v. Borden Co., 308 U. S. 188, 198.

“It is a cardinal principle of construction that repeals by implication are not favored. . . . It is not sufficient, as was said by Mr. Justice Storey in *Wood v. United States*, 16 Pet. 342, 362, 363, to ‘establish that subsequent laws cover some or even all of the cases provided for by the (prior act); for they may be merely affirmative, or accumulative, or auxiliary.’ There must be a ‘positive repugnancy between the provisions of the new law, and those of the old . . .’”

United States v. Borden Co., *supra*, at 198, 199.

It is also well established that the choice of prosecution or proscribed conduct is left to the Government.

“Where Congress by more than one statute proscribes the private course of conduct, the Government may choose to invoke either applicable law”

Rosenberg v. United States, 346 U. S. 273, 294 (Opinion of Justice Clark);

United States v. Gilliland, 312 U. S. 86, 95-96;

United States v. Beacon Brass Co., 344 U. S. 43, 45;

United States v. Noveck, 273 U. S. 202, 206-207.

It is contended, however, that the allegations of the indictment and the evidence produced by the Government tended to show commission of offenses and conspiracy to commit offenses punishable as misdemeanors under 42 U. S. C. A., Sec. 271(a) or 18 U. S. C. A., Secs. 42-43, and that violation of neither could be proved without proving violation of the other, and that, in these circumstances, the prosecution must be for commission of and conspiracy to commit the offense carrying the lesser penalty.

It is assumed that appellants' above stated argument applies to an alleged congruity of proof between violations of 19 U. S. C. A., Secs. 1461 and 1484 (as expressed through 18 U. S. C. A., Sec. 545 as in the instant indictment) on the one hand, and 42 U. S. C. A., Sec. 271(a) or 18 U. S. C. A., Secs. 42 and 43 on the other hand. However, an examination of these statutes makes it clear that there is a real difference in proof to make out their respective violations. Section 1461, *supra*, provides for inspection of imported merchandise. Section 1484, *supra*, sets out ten requirements prerequisite to the legal importation of merchandise into the United States. Thus, it is submitted, that these sections apply to all merchandise imported into the United States. 42 C. F. R., 71.152 merely imposes additional restrictions for the purpose of health and safety on the introduction of psittacine birds into the United States and its territories and possessions other than the Canal Zone. It is apparent from a reading of subsections (b) (1) and (2) of the above regulation that the requirements imposed are not meant to be exclusive of the requirements under the general importation statutes. Likewise, Title 18, U. S. C. A., Secs. 42 and 43 can in no way be held to supplant or replace the general importation statutes. To the contrary they act as a specific prohibition against the importation of certain animals and birds with minor exceptions. Again, it is submitted that any specimens introduced into the United States under the exceptions contained in Sections 42 and 43, would themselves be subject to the provisions of the general importation statutes. Obviously, it is then quite possible to violate 19 U. S. C. A., Secs. 1461 and 1484 as expressed through 18 U. S. C. A., Sec. 545, without violating either 42 C. F. R., 71.152 or 18 U. S. C. A., Secs. 42 and 43. Although cursory examination might indicate an overlap the offenses defined in the various provisions are plainly not identical.

In any event it is well established in the Federal courts that where the proof shows a violation of two overlapping provisions, the Government is not confined to prosecuting the offense possessing the lesser penalty. The choice remains open to the prosecutor.

Thus, in *United States v. Gilliland*, 312 U. S. 86, the Court sustained convictions under Section 35 of the Criminal Code, as amended in 1934, where the defendants had submitted false and fraudulent reports to a government agency under the so-called "Hot Oil" Act of 1935, 49 Stats. 30. It was conceded that defendants' acts violated both Section 35, the general "false statements" felony statute, and the "Hot Oil" Act, which made such acts misdemeanors. It was argued that defendants could be punished only under the latter Act, since it was (a) more specific, dealing with the precise subject matter involved, (b) later in time, and (c) prescribed a less severe penalty. Arguing for repeal by implication, counsel for the defendants at page 88 of the United States Report:

"Otherwise, we have the same offense created and punished by two distinct enactments and at the election of the prosecuting officer the offender may receive as punishment not more than six months in jail or \$2,000 fine, or ten years in the penitentiary and \$10,000 fine."

The Government argued that the sanctions were merely "cumulative, or auxiliary," citing *Wood v. United States*, 16 Pet. 342, 363, and stated:

"That the same act should be subject to prosecution as a felony or as a misdemeanor is one of the commonplaces of contemporary penal legislation." (Government's Br. p. 33.)

Chief Justice Hughes speaking for a unanimous court stated at pages 95 and 96:

“In the light of the text of the Act of 1934, amending Section 35, and its legislative history, it is also clear that the fact that the penalty prescribed by Section 35 was greater than that fixed by the Act of February 22, 1935, has no significance in connection with the construction and application of the former. The matter of penalties lay within the discretion of Congress. Section 35 covered a variety of offenses and the penalties prescribed were maximum penalties which gave a range for judicial sentences according to the circumstances and gravity of particular violations.

“Similarly lacking in merit is the contention that the Act of February 22, 1935, operated to repeal Section 35 as amended in 1934 so far as the latter applied to affidavits, documents, etc. presented in relation to ‘hot oil.’ There was no express repeal and there was no repugnancy in the subject matter of the two statutes which would justify an implication of repeal. The Act of 1934, with its provisions as to false and fraudulent papers, has its place as a fitting complement to the Act of 1935 as well as to other statutes under which, in connection with the authorized action of Governmental Departments or Agencies, the presentation of affidavits, documents, etc., is required. There is no indication of an intent to make the Act of 1935 a substitute for any part of the provisions in Section 35. See *Posadas v. National City Bank*, 296 U. S. 497, 503, 504; *United States v. Borden Company*, 308 U. S. 188, 198, 199.”

To paraphrase the above quotation there is no indication of an intent to make either 42 C. F. R. 71.152 or 18 U. S. C. A. 42 and 43 a substitute for any part of

the provisions of 19 U. S. C. A., Sections 1461 and 1484, as expressed through 18 U. S. C. A., Sec. 545.

Another Supreme Court opinion that strongly supports the Government's contention here is *United States v. Beacon Brass Company*, 344 U. S. 43. The question there was

“whether by enacting a statute specifically outlawing all false statements in matters under the jurisdiction of the United States 18 U. S. C. A. 1001, Congress intended thereby to exclude the making of false statements from the scope of Section 145(b) [of the Internal Revenue Code].”

The Court with Justice Black dissenting answered in the negative, even though the statute of limitations barred prosecution of the defendant under 18 U. S. C. A. 1001. The Court stated at pages 45 and 46:

“We have before us two statutes, each of which proscribes conduct not covered by the other, but which overlap in a narrow area illustrated by the instant case. At least where different proof is required for each offense, a single act or transaction may violate more than one criminal statute. *United States v. Noveck*, 273 U. S. 202, 206; *Gavieres v. United States*, 220 U. S. 338. Unlike Section 35(a), Section 145(b) requires proof that the false statements were made in a wilful effort to evade taxes. The purpose to evade taxes is crucial under this section. The language of Section 145(b) which clearly outlaws wilful attempts to evade taxes in any manner is clearly broad enough to include false statements made to Treasury representatives for the purpose of concealing unreported income.

“We do not believe that Congress intended to require the tax enforcement authorities to deal differently with the false statements and with other

methods of tax evasion. By providing that the sanctions of Section 145(b) should be 'in addition to other penalties provided by law,' Congress recognized that some methods of attempting to evade taxes would violate other statutes as well. See *Taylor v. United States*, 179 F. (2d) 640, 644. Moreover, since no distinction is made in Section 35(a) between written and oral statements, the reasoning of the Court below would be equally applicable to false tax returns which are, of course, false written statements. But the Court of Appeals have uniformly applied Section 145 to attempts to evade taxes by filing false returns. *e. g.*, *Gaunt v. United States*, 184 F. (2d) 284, 288; *Taylor v. United States*, *supra*, at 643, 644. Further support for our conclusion can be found in *United States v. Noveck*, *supra*, where this Court rejected the contention that the enactment of 145(b) imply the repeal general perjury statute insofar as that statute applied to false tax returns made under oath. *c.f. United States v. Gilliland*, 312 U. S. 86, 93, 95-96."

Similarly, in *United States v. Noveck*, 273 U. S. 202, the defendant was indicted and convicted of a felony under the general perjury statute (Sec. 125, Crim. Code, 1909) for having filed false income tax returns. He argued that that provision had been repealed *pro tanto* by the enactment of Section 145(b), Section 253 of the Internal Revenue Act of 1918, making it a misdemeanor wilfully to attempt in any manner to defeat or evade the income tax. Rejecting this contention for a unanimous court, Mr. Justice Brandeis stated:

"The offenses defined in the two statutes are not identical. They are entirely distinct in point of law, even when they arise out of the same transaction or

act The fact that perjury is a felony, while filing a false return is only a misdemeanor presented no obstacle.”

Here again, where the proof showed violations of both statutes, the Court held that the choice was for the Government.

The uniform result reached by the Supreme Court in all cases similar to the present one is not surprising. Since the Department of Justice and the Grand Jury have the power to decide whether an accused shall be prosecuted, they certainly have the purely incidental power to decide which of two applicable statutes to invoke. In performing their duty to “prosecute for all offenses against the United States” 28 U. S. C. A. Sec. 507, United States Attorneys necessarily have a certain degree of discretion. *Hale v. Henkel*, 201 U. S. 43, 65. They have a high degree of discretion with respect to what matters shall be presented to the Grand Jury. *United States v. Thompson*, 251 U. S. 407, and with respect to the selection of the statute under which criminal prosecution will be brought. *Gilliland v. United States*, *supra*; *Deutsch v. Aderhold*, 80 F. 2d 677, 678 (5 Cir.), *District of Columbia v. Buckley*, 128 F. 2d 17, 20-21 (C. A. D. C.); *Howell v. Brown*, 85 Fed. Supp. 537, 539-540; *Cf.*, *General Motors Acceptance Corp. v. United States*, 286 U. S. 49, 56, 59-60; *Confiscation cases*, 7 Wall 454, 457; *Clemens v. United States*, 137 F. 2d 302, 305 (4 Cir.); *United States v. Brokaw*, 60 Fed. Supp. 100; *United States v. Lange*, 128 Fed. Supp. 797, 799.

It is submitted by the Government that there is nothing whatsoever in the *Berra* opinion which would cause this Honorable Court to impinge in any way upon the time honored rule that where a single act violates more than one criminal statute, the Government may select the statute under which it chooses to proceed. Accordingly it

is submitted that the *Berra* case contributes nothing which would cause reexamination of the position already taken by this Honorable Court in the *Steiner* and *Murray* cases (both *supra*.) Under the evidence adduced at the trial of the instant case appellants were properly sentenced for violations of 18 U. S. C. A., Sec. 545 for the smuggling of psittacine birds.

The Substantive Counts of the Indictment by Which Appellants Duke and Ballard Were Charged, Are Valid.

Appellant Duke contends that the indictment is fatally defective on its face as to all its substantive counts viz: Counts II, III, V, VI, VIII, IX and X. Appellant Ballard makes the same contention as to Counts V and VI which are the substantive counts on which he was convicted. In support of this contention a two-fold argument is advanced. First it is urged by means of rather elaborate forensic dialectic that psittacine birds are not merchandise which should have been invoiced within the meaning of the Customs laws. A similar contention was advanced in *Steiner v. United States* (1956, 9th Cir.), 229 F. 2d 745 and was emphatically rejected by this Honorable Court, Judge Mathews stating at page 747:

“Appellants contend that the birds mentioned in Count One were not merchandise within the meaning of 18 U. S. C. A. §545. There is no merit in this contention.”

In taking this position this Honorable Court is in accord with the other Circuits since it has generally been held that the term “merchandise” is broad enough to encompass practically all articles which might be introduced into this country. In *United States v. Kushner* (1943, 2nd Cir.), 135 F. 2d 668, cited by appellant Ballard and Appel-

lant Duke, the Court in considering a similar argument advanced relative to gold bullion, stated at page 670:

“It seems clear, however, that the statutes, 19 U. S. C. A., §§1461, 1484, which require the inspection and invoicing of all ‘merchandise’ brought into the country include duty free gold bullion. Merchandise is defined by 19 U. S. C. A., §1401(c) as ‘goods, wares, and chattels of every description and includes merchandise the importation of which is prohibited.’ This is broad enough to include gold. *Shaar v. United States*, 5 Cir., 269 Fed. 26; *Lozano v. United States*, 5th Cir., 17 F. 2d 7.”

As stated in the *Kushner* case such views are clearly proper in view of the definition of merchandise contained in 19 U. S. C. A., Sec. 1406:

“(c) Merchandise. The word ‘merchandise’ means goods, wares, and chattels of every description *and includes merchandise the importation of which is prohibited.*” (Emphasis added.)

It is therefore submitted that psittacine birds are merchandise which should have been invoiced within the meaning of 19 U. S. C. A., Chapter IV.

While of no apparent importance, in passing it might be commented that the *Kushner* case, *supra*, does not support the contention for which appellant Ballard cites it. It is stated at page 17 of Ballard’s Brief that an essential ingredient of a violation of the first paragraph of 18 U. S. C. A., Sec. 545, is an intent to defraud the United States of *revenue* (citing *Kushner, supra*). *Kushner* was decided under 19 U. S. C. A., Sec. 1593(a), a predecessor Statute of present 18 U. S. C. A., Sec. 545. In the former statute it was expressly provided that:

“If any person knowingly and wilfully, with intent to defraud the *revenue* of the United States, smuggles,

or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse, any false, forged, or fraudulent invoice or other document or paper, . . . shall be fined in any sum not exceeding \$5,000, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the court.” (Emphasis added.)

The Court in *Kushner* found only great reluctance that there must be an intent to defraud the *revenue* of the United States, stating such to be contrary to the general rule. Section 545, however, does not contain the provision that the intent to defraud the United States must be directed toward its revenue, as a result, while such may have been a requisite under the earlier statute construed in *Kushner*, such a restriction is not applicable to Section 545.

Second, appellant Duke urges the substantive counts of the indictment (II, III, V, VI, VIII, IX and X) are defective in that they allege no facts which would show a violation of Section 545. Appellant Ballard makes the same contention as to Counts V and VI. The gravamen of the argument advanced is that it is insufficient to charge that appellants violated 18 U. S. C. A., Sec. 545 by failing to comply with the provisions of 19 U. S. C. A., Secs. 1461 and 1484. It is pointed out that in *Steiner v. United States* (1956, 9th Cir.), 229 F. 2d 745 (*supra*), this Honorable Court held insufficient, counts of the indictment alleging in the words of the statute a violation of 18 U. S. C. A., Sec. 545, by importation “contrary to law.” See also: *Babb v. United States* (1955, 5th Cir.), 218 F. 2d 538 (*supra*).

Initially, it is well to point out that even under the *Babb* case appellants’ argument must at best be restricted to

the "receiving and facilitating counts of the indictment" (Counts III and VI). That the argument lacks application to the smuggling counts (II, V, VIII, IX and X) is apparent from a reading of Note 7, page 541 of the *Babb* Opinion wherein it is stated in applicable portion:

"Hill v. United States, 4 Cir., 42 F. 2d 812-814, charged the smuggling and clandestine introduction into the United States of specifically described merchandise contrary to the provisions of section 593 of the Tariff Act. The court points out that the word 'smuggle' has a well understood meaning. *Babb v. United States*, 5th Cir., 210 F. 2d 473, 474, does not discuss the point here involved or the *Keck* case. In addition, the indictment alleged that the cattle were smuggled and clandestinely introduced into the United States, one of the counts said they were brought in without being inspected and invoiced as required by law, some of the counts said they were brought in from Mexico."

In this connection, it will be noted that the "smuggling counts" (Counts II, V, VIII, IX and X) in the case at bar all charge that the psittacine birds here in question were smuggled and clandestinely introduced into the United States and that they were brought in from a foreign country, namely Mexico. Therefore, assuming *arguendo* the applicability of appellants' argument at all, its scope must be confined solely to the receiving and facilitating Counts III and VI.

Later cases establish conclusively that modern law has left the primitive stage of formalism which required the statement of an offense with great formal detail. As stated in *Donnelly v. United States* (1950, 10th Cir.), 185 F. 2d 559:

"The specificity formally held necessary to charge an offense is no longer required or sanctioned."

The function of the indictment in criminal pleading has recently been succinctly stated by this Honorable Court in the case of *Elwert v. United States* (1956, 9th Cir.), 231 F. 2d 928, 931:

“An indictment meets the requirement of the Fifth Amendment and Rule 7 of the Federal Rules of Criminal Procedure, 18 U. S. C. A., if it charges all the essential elements of the crime clearly enough to enable the defendant to prepare his defense and to plead the judgment in bar to a future prosecution for the same offense. *Todorow v. United States*, 9th Cir., 1949, 173 F. 2d 439, 446-447. The sufficiency of an indictment is tested by practical considerations, and defects not affecting substantial rights are disregarded. See, *E. G. Hopper v. United States*, 9th Cir., 1943, 142 F. 2d 181.”

In *United States v. Lemont* (1956, C. A., D. C.), 236 F. 2d 312, 315, the District of Columbia Circuit stated:

“It is of course the function of an indictment to set forth without unnecessary embroidery the essential facts constituting the offense and thus accurately acquaint the defendant with the specific crime with which he is charged.”

In *Hughes v. United States* (1940, 6th Cir.), 114 F. 2d 285, 288, the Court said:

“The true test of the sufficiency of the indictment is whether it contains the elements of the offense intended to be charged, and sufficiently apprises the accused of what he must be prepared to meet, so that the judgment may be a bar to further proceedings against him for the same offense. *Stumbo v. United States*, 6th Cir., 90 F. 2d 828; *Bogy v. United States*, 6th Cir., 96 F. 2d 743.”

See also:

Danaher v. United States (1930, 8th Cir.), 39 F. 2d 325;

United States v. Cuddy, 39 Fed. 696, 697;

United States v. George, 228 U. S. 14; 33 S. Ct. 412; 57 L. Ed. 712;

Beard v. United States (1935, C. A., D. C.), 82 F. 2d 837;

Hagner v. United States, 285 U. S. 427; 52 S. Ct. 417, 76 L. Ed. 861;

United States v. Bryson (1953, D. C., N. D., Cal.), 16 F. R. D. 477;

Rule 7(c) Federal Rules of Criminal Procedure, 18 U. S. C. A.

In drawing an indictment it is not necessary that the government go to great detail in setting out the facts involved in the offense. Such matters are properly left to the proof, it being sufficient that the indictment be drafted in the language of the violated statute unless such statute includes by implication an essential element which is not alleged in the indictment.

Lynch v. United States (1951, 5th Cir.), 189 F. 2d 476;

United States v. Hess, 124 U. S. 483;

Robertson v. United States (1948, 5th Cir.), 168 F. 2d 294;

United States v. Franklin (....., 7th Cir.), 188 F. 2d 182, 186;

Todorow v. United States (....., 9th Cir.), 173 F. 2d 439, 447.

As hereinabove set out the second paragraph of 18 U. S. C. A., Sec. 545, provides:

“Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law . . .”

It is apparent that to state the offense in the words of the statute leaves an apparent ambiguity and indefiniteness in that it is not stated what law the merchandise was imported contrary to. This was the holding of this Honorable Court in *United States v. Steiner, supra*, and also the holding of the Fifth Circuit in *United States v. Babb* (1955), 218 F. 2d 538, *supra*. This deficiency is cured in the receiving and facilitation counts (III and VI) by the provision that the importation was “contrary to U. S. Code, Title 19, Chapter IV, and particularly sections 1461 and 1484 thereof.”

It is important to bear in mind that the substantive counts of the instant indictment charge violation of 18 U. S. C. A., Sec. 545, and such violations are stated in substantially the language of the statute. The designation of 19 U. S. C. A., Secs. 1461 and 1484, is to particularize in what way 18 U. S. C. A. Sec. 545 was violated. *Sutton v. United States* (1946, 5th Cir.), 157 F. 2d 661, cited by appellants, is distinguishable. In that case an otherwise legal act (possession of sugar) was sought to be made illegal by the bare allegation in the indictment that such sugar was held “in violation of Second Revised Ration Order No. 3 and General Ration Order No. 8 as amended.” As pointed out by the Court, these Orders occupy pages and pages of looseleaf papers and it was impossible even upon a diligent search to ascertain pre-

cisely which of the many prohibitions and conditions thereof it was contended that the defendant had violated. As the Court stated in denying the Petition for Rehearing, at page 670:

“Orders No. 3 and 8 are a looseleaf code of regulations and prohibitions that were promulgated, construed, explained by rationales and amended repeatedly. The information in this case amounts to no more than charging the defendant with violating this Criminal Code by having in his possession and under his control 10,000 pounds of sugar. If this judgment were affirmed, the uncertainty as to the nature and cause of the accusation would render equally uncertain a plea of former conviction if later the appellant should be brought to trial for acquiring, transporting or possessing, this same sugar without a ration order or certificate. By this test, as well as by the other one stated in our prior opinion the information is insufficient to meet the requirements of the Sixth Amendment.”

And continuing on page 671:

“The petition for rehearing fails to point out ‘where’ the possession of sugar is in violation of said section 17.11. It cites this section but mentions no other relevant provisions supplementary thereto. It also cites section 19.3 of Order No. 3, which provides that each consumer is permitted to obtain five pounds of sugar during a specified period; but this is far from citing any section of Order No. 3 that prohibits the possession of sugar not in accordance with a ration order. Undeterred by this, the petitioner argues that a brief survey of the history of sugar rationing discloses that the mere possession of sugar in excess of the quantity allotted to individuals is an offense under the regulations, but it cites no applicable section, and in the course of such argument there is a

palpable shift by petitioner from Order No. 3 to Order No. 8. Since the combined research of the court and counsel has failed to discover any provision of Order No. 3 supplementary to section 17.11, prohibiting the mere possession of sugar, we adhere to our former ruling that there is no such prohibition as far as Order No. 3 is concerned."

From this latter quotation it is apparent that had petitioner been able to point out any section of Order No. 3 that prohibited the possession of sugar not in accordance with the ration order a violation would have been made out. Contrast *Sutton* with the instant case where violation of the Customs law is alleged in the statutory language and where the specific violation is particularized by designation of 19 U. S. C. A. Secs. 1461 and 1484. Here, definite sections are cited which contain provisions with which appellants failed to comply when importing and otherwise introducing merchandise into this country. Where the information in *Sutton* palpably failed to apprise the defendant of what specific order, statute, or regulation, he had violated, the indictment in the instant case is quite definite in that regard.

Form 5 of Appendix of Forms of the Federal Rules of Criminal Procedure is a form indictment for violation of 26 U. S. C. Sec. 2833 (present Title 26, U. S. C., Sec. 5606[a]). The charge that ". . . John Doe carried on the business of a distiller without having given the bond *as required by law*" sufficiently charges the foregoing offense according to the approved form.

See also:

United States v. Perl (1954, 2nd Cir.), 210 F. 2d 457, 458.

All basic requisites of an indictment were fulfilled by the instant indictment. The receiving and facilitating

counts (III and VI) here under discussion set out the statute violated (18 U. S. C. A. Sec. 545), the date and place of violation, the defendants, their unlawful acts, the merchandise involved, their criminal knowledge and the particular statutes contrary to which they acted. All the essential elements of the crime are charged. The appellants are apprised of the charge in such a way as to be able to adequately prepare their defense. If convicted or acquitted on these counts, the charge is stated with sufficient particularity to enable them to interpose a plea of jeopardy to any subsequent attempted prosecution on these facts.

In *Steiner v. United States* (1956, 9th Cir.), 229 F. 2d 745, *supra*, this Honorable Court in holding portions of that indictment insufficient, stated at page 748:

“However, each of Counts Eight, Nine, Ten and Eleven fail to state what law (other than 18 U. S. C. A., §545) the importation mentioned therein was contrary to, or in what respect such importation was contrary to such law.”

And in *Babb v. United States* (1955, 5th Cir.), 218 F. 2d 538 (heavily relied upon by appellants), it is stated at page 541:

“We hold that the indictment should have alleged some fact or facts showing that the cattle in question were imported or brought in contrary to some law.”

It is submitted that the complete answer to the above stated requirements of these two cases is found in the statement in the instant indictment that the illegal importation was contrary to 19 U. S. C. A. Chapter IV, and particularly Sections 1461 and 1481 thereof. Accordingly, it is the position of the United States that the substantive counts of the indictment contain sufficient facts to constitute an offense punishable under the laws of the United States.

QUESTIONS INDIVIDUALLY RAISED.

Since the two foregoing sections involve questions raised jointly by two or more appellants they were, in the interest of expediency, treated jointly albeit out of order. All grounds raised herein below are raised in each instance by only one appellant. Accordingly they will be dealt with hereinafter as arguments by the single appellant as respectively indicated.

Clifford L. Duke, Jr.

Appellant Duke's Constitutional Rights Under the Fifth and Sixth Amendments Were ^{Not} Infringed by Reason of the Rulings of the Court Requiring Him to Elect Whether He Would Accept Counsel or Would Proceed in Propria Persona.

Appellant Duke first raises the question that his constitutional rights under the Fifth and Sixth Amendments were infringed by certain rulings of the Court below restricting to some extent his activities in acting as his own counsel. Appellant Duke alleges that an accused in a federal criminal case has an absolute right to the effective assistance of counsel. He further alleges that an accused in a federal criminal case has an absolute right to act as his own counsel. At the commencement of the trial below appellant Duke sought to associate Clifford Fitzgerald, Esq., a member of the San Diego Bar. At this point he was informed by the Court below that he could either appear *in propria persona* or could be represented by counsel but that he could not do both simultaneously. It is this ruling, basically, which gives rise to this particular ground of appeal. Inasmuch as appellant Duke concludes that the trial court at the very least abused his discretion,

appellee deems it necessary to set out pertinent portions of the record in this regard. Thus, the problem had its inception on page 28 of the transcript wherein the following colloquy took place:

“Mr. Duke: I am representing myself, your Honor, associating Mr. Fitzgerald.

Court: You can't do that. Is Mr. Fitzgerald of record?

Mr. Duke: No, your Honor.

Court: Well, you had better get yourself a lawyer of record, or if you are going to defend yourself bear in mind the rule. Now I don't know how firm a rule it is, but it is a rule that those who give testimony cannot argue the case to the jury. And if you intend to testify, bear in mind that there are rules which would prevent your arguing the case to the jury, if you do that. If you want Mr. Fitzgerald to be your attorney, get him of record. If he is of record you cannot act in pro per or as an attorney with him. . . .

The Court: We have to be practical about the case.

Mr. Fitzgerald: That is right.

The Court: . . . And if there are rules of law which govern the situation, which there must be, although I suspect that a lot of them are what Justice Oliver Wendell Holmes said they were not. He said, 'The law is not a brooding omnipresence in the skies, but is the articulate voice of a sovereign or quasi sovereign.' I don't know whether the sovereign has articulated on all the subjects.

But Mr. Duke is a member of the Bar of this court.

Mr. Fitzgerald: That is right.

The Court: Mr. Duke is a defendant in this case. Mr. Duke is necessarily emotionally involved in it because he has, if he should be convicted here, more to lose than any other defendant. I have not yet physically received the pretrial statement of the Government. All I know is from reading the indictment. Mr. Duke is charged with enough to make his future professional life very dubious here if he should be convicted of any one of the counts.

Mr. Fitzgerald: That is right.

The Court: Now, he being necessarily involved as a man would, emotionally in the problem, it is just not a good thing for him to be participating as an attorney in the courtroom. You know Mr. Fitzgerald, how many times a lawyer will say or do things which will militate very strongly against him when he acts under the stress of emotion.

Mr. Fitzgerald: Yes.

The Court: How much more he is apt to do that if he is both client and lawyer. I don't think it is practical.

Of course, you are in the position of having a client here who, being a lawyer and having had the experience he has had with early litigation which will be mentioned in this case, and facts which have been litigated in other cases, you can draw a great deal from just conferring. *And I don't mean to indicate that you should not have the benefit of full conference with him, and we will recess whenever conferences are actually needed, if the requirements of justice are such we should do that.* [Emphasis added.] But for Mr. Duke to undertake to examine witnesses or to argue motions or evidence, I think, it is very unwise from the standpoint of Mr. Duke himself, from the standpoint of your having adequate control of his case, and from the standpoint of an orderly

procedure here. I don't think if you give it serious consideration you will quarrel too much with the indication the court has made, that all questioning and argument should be made by you and not by you and Mr. Duke.

Mr. Duke: I didn't . . . —please of the court, I had never intended to argue the case. I realize the rule, that having testified myself, I wouldn't be permitted to argue nor would it be wise for me to argue my own testimony or any of the testimony. And I realize my own emotional feelings in the case.

However, as to certain matters, such as questions of law that might come up before your Honor that I am versed in, having gone through many motions of a similar character in the other case, and having filed a brief in the Court of Appeals for the Ninth Circuit on questions of law, I feel it would take . . . I could argue those without expending too much time in any additional research.

I think I could contain my emotions in your Honor's presence so I can present those arguments as an advocate and not as a defendant. I have heretofore appeared as my own counsel and argued the motions and have . . .

The Court: You haven't been indicted before, have you?

Mr. Duke: I mean in this particular case, your Honor. All the motions heretofore I have argued on my own behalf.

The Court: Do you have any objection to Mr. Duke participating in the argument on motions?

Mr. Bowler: On motions?

The Court: Yes.

Mr. Bowler: None.

Mr. Stewart: That is out of the presence of the jury, I assume.

The Court: They usually are. On motions which are being presented out of the presence of the jury the court will hear you, Mr. Duke."

Appellant Duke raised no objection to the above ruling apparently acquiescing in it since he then proceeded to go on to a further subject wherein he said at page 33 of the transcript:

"Mr. Duke: Then there is one more thing. There will probably be called one or two witnesses that I would like very much to examine myself. I won't share that examination with—that is, I wouldn't have two counsel on my behalf examining the witness, but it will not be very much. But I would like to reserve that right to examine one or two witnesses.

* * * * *

[Tr. p. 34.]

"The Court: Gentlemen, it appears to me so far as I can decide that matter, it must be decided on principles of law rather than upon principles of whether it is wise for Mr. Duke or pleasant for the litigants and other lawyers and witnesses. Now, a man is always entitled to be represented by counsel of his own choosing. You have opposed to that the restrictions which are placed upon lawyers who also have other capacities in the case. I don't know at the moment whether I can restrict Mr. Duke and Mr. Fitzgerald from having Mr. Duke participate in the examination of witnesses. If I can I will, because I don't think he should do it. It is inviting too much of the sort of thing which lawyers, in the heat of advocacy, as the appellate court say, will do, which should not be done. It is inviting the argumentative question; which often to a venireman sounds like testimony, but is, in fact, interrogation. It is inviting the overstepping of a kind that a person, emo-

tionally involved and personally involved as a litigant is, shouldn't do.

So if I can keep him from doing it I will, but I am not going to take away any of his legal rights.
. . .”

The matter at that time was temporarily abandoned but the following day the Court clarified its ruling. It at that time announced a relaxation of the general rules so as to permit appellant Duke to cross-examine witnesses, viz. [Tr. 40]:

“The Court: Now, that there be no confusion about the participation of Mr. Duke, I think I indicated in yesterday's session that Mr. Duke is either under an obligation to appear in pro per or to be represented by counsel, but that a hybrid of the two is something to which he does not have a right as a matter of right.

The cases to which I have had access since that matter was presented to me yesterday bear that out. It is the court's understanding that Mr. Fitzgerald will make all arguments of fact and the opening statement to the jury on behalf of Mr. Duke, and Mr. Duke's participation in the trial except as he will participate as a defendant and as a witness, if he so chooses, will be that he will be here as a defendant. He may be a witness, if he so elects, and the Court will permit him to participate in the cross-examination of witnesses or in the direct examination of witnesses to the extent that we will continue to recognize the rule that there shall be but one counsel for a side or party as to any one witness.

So if Mr. Duke undertakes to cross-examine a witness, Mr. Fitzgerald will not. If Mr. Fitzgerald undertakes to do the examining, Mr. Duke will not participate in it, as to that particular witness. . . .

. . . Now, in this case, if we get into argumentative examination of witnesses, the sort of thing that a defendant's natural interest in the case will tempt him to do, then I will not permit further examination of witnesses by Mr. Duke. As long as the examination conducted by Mr. Duke remains entirely an examination, free from argument, then Mr. Duke may participate in the examination to the extent the Court has indicated.

Are there any other matters we should take up before the jury comes in?

Mr. Duke: If it please the Court, for the record, may I note an exception to the court's ruling to the extent that I cannot make an opening statement on my own behalf?"

* * * * *

"The Court: . . . I understand you want to make an opening statement, you want to argue the case.

Mr. Duke: No, I do not want to argue the case, your Honor.

The Court: You can't make an opening statement, either.

Mr. Duke: I only want to make an opening statement because I alone am prepared—

The Court: That is your misfortune, Mr. Duke. You have been under indictment here for months, and to come to court with only yourself prepared, knowing the law or being trained to know it, is just something you are going to have to live with. Now, you get Mr. Fitzgerald educated as to the facts.

I know academically you are educated, Mr. Fitzgerald, but as to the facts, if you are not well prepared, *you proceed last and I will see there is ample recess so that Mr. Duke can write it out, if he wants.*

[Emphasis added.]

But we are not going to have him stand before the jury and make the statement.”

The foregoing rulings of the Court were correct. While an accused is entitled to assistance of counsel in a Federal criminal case or is entitled to appear *in propria persona* and conduct his own defense, the choice is in the alternative and not the cumulative. The accused must make his choice. The Federal authorities are clear in support of the proposition that one cannot both be represented by counsel and represent one's self simultaneously. Thus, in 28 U. S. C. A. Sec. 1654, it is provided:

“In all courts of the United States the parties may plead and conduct their own cases personally *or by counsel*, as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein. As amended May 24, 1949, C. 139, Section 91, 63 Stats. 103.” [Emphasis added.]

That the above quoted section [1654] states the right in the alternative, has been established and the constitutionality of the statute upheld.

Shelton v. United States (1953, 5th Cir.), 205 F. 2d 806.

In *United States v. Foster* (1949, D. C., S. D. N. Y.), 9 F. R. D. 367, Judge Medina stated, at 372:

“In the Federal courts, where a defendant has no right to be heard both in person *and* by attorney, it would seem clear that the control of the proceedings by the court is no less extensive.” [Emphasis theirs.]

A leading case on the subject is that of *United States v. Mitchell* (1943, 2nd Cir.), 137 F. 2d 1006 at 1010, wherein it is stated:

“The cases cited by defendant stress equally, as indeed, they probably should, the right of an accused

to act for himself and his right to have a lawyer assigned in his behalf [citing authority]. Obviously however, those rights cannot be both exercised at the same time."

Thus, it is clear that the trial court acted correctly in refusing to allow Duke to appear both through counsel and *in propria persona*. Without extensive discussion it may be said accused may not demand assistance by counsel which is free from all error for it is obviously true that in any lawsuit one good attorney must loose. All that may be demanded is that an attorney appear, advise, counsel and represent his client at all steps of the proceedings. If he does this and his mistakes are not such as to reduce the proceedings to farcical proportions the accused is accorded all due protection under the Sixth Amendment.

See:

Losieau v. United States (1949, 8th Cir.), 177 F. 2d 919;

United States v. Regan (1948, 7th Cir.), 166 F. 2d 976;

Moss v. Hunter (1948, 10th Cir.), 167 F. 2d 683;

Soulia v. O'Brien (1950), 94 Fed. Supp. 764;

Meritt v. Hunter (1948, 10th Cir.), 170 F. 2d 739;

United States v. Wight (1949, 2nd Cir.), 176 F. 2d 376 at 379;

Williams v. United States (1954, 4th Cir.), 218 F. 2d 276, 279-280;

Hayman v. United States (1953, 9th Cir.), 205 F. 2d 891, 894, and authority collected in Note 2, page 895;

United States ex rel. Thompson v. Dye (1952), 103 Fed. Supp. 776.

Appellant Duke takes the position that he was irreparably prejudiced by the rulings of the Court relative to his role in the trial. The existence of such prejudice is nowhere shown other than by its bare allegation and a considerable indulgence in supposition, conjecture and surmise. Appellant Duke supports this thesis by a diatribe, the gist of which is that he alone was sufficiently familiar with the facts and law of this case to give himself adequate representation; that realizing he would have to assume not only the role of the advocate but also that of the defendant—witness he sought to associate Mr. Fitzgerald to “help him over the rough spots,” that Fitzgerald was not familiar with the facts or the law of this case and that by in effect compelling Duke to play a subordinate role to Fitzgerald, the Court permitted extraneous issues to seep into the case to Duke’s prejudice. Specifically, appellant Duke alleges that it was through Fitzgerald’s unfamiliarity with the case that the so-called “special defense” was interjected into the proceedings. This issue has become so inextricably intertwined throughout the various facets of the case, and is so relied upon by appellant Duke, that it warrants a somewhat extended discussion at this juncture.

Basically, the so-called “special defense” had its genesis in appellant Duke’s allegations that his prosecution was the result of a plot or conspiracy by certain public officials in conjunction with organized labor, to frame him on these charges. It was made clear by the Court below that such a conspiracy, if in fact one did exist, could be considered as a reason for the adverse testimony of certain witnesses [Tr. 3207, 3208, 5089]. Although appellant Duke *now* alleges that his claim of “conspiracy” or “frame-up” was misinterpreted by Court and counsel with detrimental effect to his cause, when the skein of the development of this issue is traced throughout the proceedings below it becomes apparent that appellant Duke and not the Court or the prosecutor or Mr. Fitzgerald or Mr. Whelan was the responsible party.

The first mention of this alleged "conspiracy" occurred even before the trial below commenced, namely, at the time of appellant Duke's arraignment on a companion case. While not strictly a proceeding in the instant case, it is contained in appellant Duke's extensive appendix and as such may be considered by this Honorable Court as part of the record herein on the theory that it is a stipulation for an admission which is pertinent to the issues involved in this appeal.

United States v. Jones (1949, 9th Cir.), 176 F. 2d 278.

Thus, at page 12 of the appendix it appears that at his arraignment appellant Duke made the opening statement in what was to become known as his "special defense" when he stated:

"I am convinced that I will be able to prove, and with a great degree of speed, that the charges are completely false, and for that reason I don't think the trial would be long.

"I think it would be very short, and I think I will be able to show that certain individuals, labor leaders and their attorneys, in league with Customs officers, have entered into a conspiracy to, if I may say, if it please the Court, to obstruct justice themselves by procuring false evidence and having such evidence presented to the United States Grand Jury, so I would like, if it please the Court, to be able to show that and have this determined at the earliest possible moment."

Again at page 14 of his appendix, appellant Duke states:

"However, I will state to the Court that I do think there is a matter of public concern here and that is as stated to the Court. I think that there is—I have clear proof, clear, unequivocal, undenied evidence that there has been conspiracy entered into by officers

of the court, attorneys in this community representing labor organization, and United States Attorneys, not only to procure false evidence to have me *indicted*, but also to commit murder.

“Before I went before the grand jury to testify myself, my life was threatened by these people, and I think, due to the interests of—”

Despite this unequivocal announcement, appellant Duke now maintains that this accusation of “frame-up” or “conspiracy” against him was something not of his own doing but something that was thrust upon his unwilling shoulders by the Court, the prosecutors, and his attorney, Mr. Fitzgerald. The facts belie any such assertion. The theory originated with appellant Duke, and was perpetrated and acquiesced in by appellant Duke. Under this theory appellant Duke was permitted to introduce much testimony, ordinarily inadmissible, to prove that he was the victim of a conspiracy to convict him upon perjured evidence. To illustrate, during the morning session of August 23, 1955, in the presence of appellant Duke the following colloquy took place without objection from him [Tr. 1955]:

“The Court: Well, going back to what the Court was asked to inquire of prospective jurors, when we were impaneling the jury, it was made abundantly clear to me that it was going to be claimed that this prosecution was part of a frame-up because of the displeasure which some union or union officials had with Mr. Duke, because of things he had done in the performance of his official duty as a Deputy District Attorney of San Diego County. Is that right, Mr. Fitzgerald?

Mr. Fitzgerald: That is right, your Honor.

The Court: All right. Now, if this case is a part of such a frame-up, I think the jury should know

it and any defendant who asserts that a prosecution of the type which has been put on here is not based upon true evidence, but is fabrication because of the animosity of union officials, apparently the contention is with connivance or, at least, knowledge of those prosecuting the case, would be a prosecution which should not be favored. In fact, there should be other prosecutions if people are brought before a jury on a criminal charge simply as an act of vengeance because of having offended some union official or officials.

If labor unions have reached that stage of strength or labor union officials are that corrupt, then we should certainly know it and there should be appropriate precautions.

Hence, it appears to the Court that door is always open to a defendant to show he has been framed. And this is what the defendant Duke is undertaking to do at the present moment, with the testimony of witness Buono.

Objection overruled."

Appellant Duke was present but he made no effort to correct what he now chooses to characterize as the "collateral tangent" the trial was taking.

In the afternoon session of September 2, 1955, in the presence of appellant Duke at the conclusion of a witness' testimony, the prosecutor moved to strike certain of the testimony. In denying the motion and allowing the testimony to remain, the Court stated:

"The Court: Well, suppose you did conspire to build up a false case against Mr. Duke, wouldn't he be entitled to prove it piecemeal, just as you prove your conspiracy piecemeal?

Would this perhaps not be one of the straws which, put together might develop into a real haystack?

In charges of conspiracy, whether it be a conspiracy committed by the defendant or a conspiracy to wrongfully prosecute a defendant by overzealous law enforcement officers, a very wide latitude must be allowed and the conspiratorial situation is developed, if it exists, not by any one bold striking piece of evidence, but by introduction of what you might call straws, which cumulatively combine to produce a mass of evidence pointing toward one or the other theories.

I deny the motion. It is relevant evidence."

Again appellant Duke was present and again he made no effort to correct what he now claims is an erroneous conception of his defensive theory.

But we are not left to rely merely upon appellant Duke's silence to establish the impression of tacit acquiescence. The Court specifically framed the various theories of defense and appellant Duke expressly agreed with the synopses given by the Court. This occurred in the presence of appellant Duke during the morning session of September 2, 1955. An objection was interposed by the prosecutor to a question which plainly called for a hearsay answer. The Court stated [Tr. 2306]:

"The Court: The Court understands and I can see your objection, because ordinarily these questions are impeachment questions. By that I mean, members of the jury, these situations usually arise when some witness has denied a particular conversation, that is, has denied saying a particular thing or has said that a particular thing was said.

So counsel always, if they follow the law very meticulously, ask the witness, 'Did you not at a certain time and place' say whatever it was using the substance of the words, and sometimes the exact words are 'Did you not say the same thing.'

Then the witness, having been confronted with the alleged conversation, either admits or denies it. If he admits it, that is the end of it, so far as evidence is concerned.

If he denies it, then at a later time the questioner decides to ask that question having laid the foundation by having had a witness say, 'No, I did not say certain things' he calls someone who claims to have heard the conversation, in the same substance and effect, that is, the same words are stated to the witness, and 'Did Sankary' or whoever it was, 'at such a time and place say that?'

Well, you can see that in situations such as this, not having had Mr. Sankary, we are not in a position to hear evidence undertaking to show that Sankary said something which Sankary has denied saying.

As I understand the defense in this case, first of all, primarily, it is the defense 'We didn't do what these prosecution witnesses have said we did. But the reason those witnesses came forth and told what, to our defense contention is a trumped up story against us, is that a certain group of persons, Sankary, Hannah, Vader, Steward, some labor unions operating in this county, the Customs Service, the United States Attorney's office'—I don't know if I have enumerated them all—'have combined together'—and I think Judge Solomon—'to induce these witnesses, who have testified for the government, to tell a false story or series of false stories in order to wreck the private vengeance of Vader, Sankary, Steward, and so on, against these particular defendants.'

Now, I don't think it is claimed that Judge Solomon was personally out to get these particular defendants, but Judge Solomon is said to be going along with the plan and scheme, and the labor unions,

Mr. Sankary, Mr. Steward, Mr. Vader, who are out to establish a trumped up false case against these defendants.

Now, when an objection is made to the giving of testimony, that someone has heard a conversation, in which someone of the accused persons allegedly said something, I think the objection must fail when the defense is as pointedly toward the fabrication of the case as we have been told it is in this case.

Now, is that right, Mr. Duke?

Mr. Duke: *That is our defense, your Honor. That is my defense.* However, I think your Honor has included persons in your enumeration of people, that were a part of the scheme, that I do not contend that were a part of it.

The Court: I am sorry, sir, then, because if you establish, indeed, a nefarious scheme, I wouldn't want to identify anyone with even the charge whom you don't contend was with it.

But I am trying to recall, as best I can without transcript here, what from memory or who from memory had been named as the parties to it.

Suppose you tell us, Mr. Duke, who the parties to this scheme are alleged to be.

Mr. Duke: Your Honor, I have mentioned no names myself. It is Mr. Hadzima, your Honor recalls who made the charge and mentioned the names.

The Court: Mr. Hadzima didn't charge that anyone had told him to testify falsely. He said he was testifying to the truth.

Mr. Duke: Your Honor, he testified that he gave a recording we put in evidence—

The Court: That recording was an impeachment matter only. Now, just tell me who these parties are who have put Hadzima, Spicuzza, Todd, and so forth, up to telling a false story against you. If you

will name them, then we will understand just who the alleged conspirators are against you, and I will be better guided in ruling as to admissibility of whose statements at one place and another, the statements not being impeaching, but the statements being admissible because they are evidence in some degree or other, either direct or circumstantial evidence of the scheme. So tell us who they are, please. . . .

Mr. Duke: I don't know all of the persons, your Honor. I have stated heretofore, I believe, that Mr. Sankary, certain labor officials in this community, some of whom I prosecuted myself once, Mr. Vader and Mr. Hadzima.

The Court: Do you contend that Wanda Sankary is in on it?

Mr. Duke: I would say and Mrs. Sankary. And these people I have just named, your Honor, I have contended, and I rely on the evidence that has been adduced so far, that other persons have either inadvertently or purposefully assisted in this scheme.

I don't know. I am going to be charitable with the United States Attorney's office and say that they were hoodwinked, and that is the position I will take at this time.

The Court: Hoodwinked or not, are you contending they are a party to it? We are repeatedly getting objections to testimony, which would ordinarily not be admissible. That is, what someone said on some courthouse steps or while they were having coffee somewhere, and that ordinarily would not be admissible. But, in the light of this particular defense, it is admissible, if they are alleged to be parties to the scheme.

Now, I don't want to talk you into enlarging your circle of alleged conspirators here, but I would like to know whether you just take the attitude that the

United States Attorney is a pawn in the thing and didn't know what they were doing. If so, we will have to stand by the hearsay rule so far as statements by their assistants are concerned.

But if they were parties to it, we should know it so I can be guided in my rulings. If you say they are parties to it, I will have to let you tell what Mr. Stewart said when he was out fishing, if you offer it.

Mr. Duke: Your Honor, being an attorney myself, I do not like to make such charges against other attorneys. I am very reluctant to do that.

As I have stated before, Mr. Stewart, and I believe stated to the Federal Bureau of Investigation, that Mr. Stewart in my opinion, has been misled and I am going to take the position at this time, and I think I am taking a charitable position, that Mr. Stewart is still being misled.

The Court: Well, then, should we say he is a misled participant in the operation of the scheme?

Mr. Duke: Yes, sir.

The Court: I will admit then evidence of what he has said at other places."

Subsequently [Tr. 3212], the Court summarized the defense of the appellant Buono as being "We didn't do it." At page 3213 in the transcript the Court characterized the defense of the appellant Ballard as follows:

"The Court: Your defense, insofar as I have observed here, is a defense of alibi. 'I wasn't present at the time.'"

Following these characterizations at page 3214 the Court stated as follows in regard to the defense advanced by appellant Duke:

"The Court: So far as Mr. Duke's special defense, or, rather, explanation of the reason why so

many people have come here with stories which have a certain degree of harmony between them, although there are, some dissimilarities, you are on a watchful, waiting basis, not participating in the contention, but not disowning it, either, is that right?

Mr. Whelan: That is correct, your Honor.

The Court: All right.

Mr. Duke: Your Honor, may I say that my defense is 'I did not do it.' There is no conflict between Mr. Buono and myself in that respect.

The Court: I understand that. I hope the jury does. Mr. Duke says that he did not do these things, but the reason he is accused of doing it and the reason so many witnesses have been brought forth to say he did, is because of the concerted acts of Mr. Sankary, Mrs. Sankary, Mr. Hadzima, Mr. Vader, certain labor officials, and unwittingly the United States Attorney, and other persons to him unknown or as to whom his information is so meager he doesn't wish to assert their identity with the plan in the present state of the evidence.

Is that right, Mr. Duke?

Mr. Duke: That is correct. I would not mention anyone's name until I was sure myself."

See also Tr. 4296-4297. From the foregoing it is clear that throughout the trial appellant Duke consistently adhered to, and acquiesced in, this theory of "frame up," "conspiracy," or if you will, his "special defense." At his instance, and with his tacit approval the Court followed this theory and admitted evidence, otherwise inadmissible, for the purpose of proving that Duke was the victim of a frame up, or at least an attempt to convict him upon perjured evidence. It is only upon appeal that he seeks to disavow this theory by alleging that it was indulged by counsel and Court to his prejudice. Appel-

lant Duke now seeks to reconcile his present position with regard to this theory of defense at page 65 of his brief whereat he states:

“The very most that can be said is that when called upon (and not before) Duke said Hadsamah was framing him, and based on what Hadsamah said, he believed Sankary and wife, Mr. Veder and some unnamed labor officials were participating. Duke expressed they took the position of the United States Attorney’s Office, including Mr. Stewart, was being misled.”

It was submitted that this is a distinction without a difference. It is further submitted that the “special defense” was relied upon by appellant Duke and repeatedly reiterated by him as his defense. He cannot disavow it now. In any event the net effect of appellant Duke’s charge of frame up was to permit the admission of a mass of otherwise incompetent evidence on his behalf on the theory that in the aggregate it would reveal a conspiracy to convict him upon perjured evidence.

No matter what the San Diego newspapers may have “glared” (Duke Br. 57) the simple fact remains that this “special defense” was appellant Duke’s creature and cannot be said to prejudice him.

The orders of the Court in denying Duke permission to appear *in propria persona* and by counsel simultaneously were correct and no prejudice resulted therefrom.

There Was No Prejudicial Misconduct on the Part of the Prosecutor.

Appellant Duke next alleges that prejudicial misconduct was committed by the prosecutor in four particulars, the first two of which occurred during the trial in the presence of the jury and the latter two of which occurred during the opening argument.

First: It is claimed that it was misconduct for the Government to call as a witness Morris Sankary (Duke's Br., 10, 37, 64). The supporting argument seems to be that Sankary was called "not to elicit any material evidence but solely for the purpose of informing the jury that Duke had subpoenaed Sankary and failed to call him as a witness." Appellant Duke cites *Milton v. United States* (1940, C. A. D. C.), 110 F. 2d 556, but fails to show in what way it is applicable to the example in point. *Milton, supra*, stands merely for the familiar principle that while failure of an accused to call a witness peculiarly within his power creates a presumption that the witness' testimony would have been unfavorable, where the witness is equally available to the Government and is, in a legal sense, a stranger to the accused, no such presumption arises. Cf., *United States v. Cotter* (1932, 2nd Cir.), 60 F. 2d 689, which indicates that the test may be which party knows the *facts* relative to the witness' proposed testimony. Under this view, on the basis of appellant Duke's statement that the United States Attorney was merely being misled but that Sankary was actually a conspirator, it is apparent that if any facts existed relative to Sankary's participation in any conspiracy to frame Duke, such facts were peculiarly known to Duke but not to the United States Attorney who, as an innocent dupe, could have had no knowledge of any nefarious scheme.

By reason of the repeated interjection of appellant Duke's so-called "special defense" (*supra*), which expressly accused Sankary of participation in a scheme to frame Duke, by the time Sankary was called to the stand by the Government he had assumed the status of the evil genius behind the alleged scheme against Duke. A brief review of the transcript reveals that prior to being called to the stand, his name had already come up in excess of 200 times during the proceedings. It was at this point that the Government called Sankary to the stand to dis-

pell some of the aura of mystery which had been cast about him. While appellant Duke chooses to assume that Sankary was called merely to impress upon the jury that Duke had failed to call him, no objection was made by Duke at the time, and the ground is raised initially on appeal. By his failure to interpose a timely objection, appellant Duke is precluded from raising this point on appeal. (*Payton v. United States* (1955, C. A., D. C.), 222 F. 2d 794, reversed in part on other grounds; *Mitchell v. United States* (1954, 8th Cir.), 208 F. 2d 854; *Isgate v. United States* (1949, 5th Cir.), 174 F. 2d 437.) Appellant acknowledges his failure to specifically object, but claims that the matter may be reviewed "in determining the cumulative effect of prejudice" (Duke Br. 12). As heretofore stated, there is no showing in what, if any, way appellant Duke was prejudiced beyond the normal give and take of trial tactics. *Milton v. United States* (1940, C. A., D. C.), 110 F. 2d 555, *supra*, cited by appellant Duke, gives him no comfort for in that case, as in the instant case, the defendant failed at the trial to object to the prosecutor's remark on his failure to call a witness. In this regard the Court stated, at page 558:

"It was the duty of counsel for the accused, at once, to call any objectionable remarks to the court's attention; to request its intervention; and in the event of the court's failure to do so, then to note an exception. This they did not do. In fact, there is nothing in the record to indicate that, at the time of the colloquy, either counsel or court regarded the challenged statement as objectionable. Only by the broadest application of the principle declared in the Wilson case can it be said that the comment would have had any tendency to create in the minds of the jury a presumption against the accused from his failure to testify. The failure of counsel to call to the court's attention shows that the assignment of

error upon this point was an afterthought. Under the circumstances the objection came too late.”

Citing *Diggs v. United States* (9 Cir.), 220 Fed. 545, 556, affirmed 242 U. S. 470, 37 S. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502 Ann. Cas. 1168, as illustrative of the lengths of permissive argument. In the instant case, as in the *Milton* case, failure of appellant Duke to call to the Court’s attention the alleged misconduct shows that the assignment of error upon this point was an afterthought. It is submitted that no prejudicial error is shown and none can be presumed.

Second: It is contended that the prosecutor committed prejudicial misconduct in his cross-examination of Duke by the following exchange [Tr. 2856]:

“[By Mr. Steward]: Isn’t it also true in that conversation you were asked whether or not you knew these defendants of yours were smuggling birds? A. No, Mr. Steward, I wasn’t asked that question.

Q. Didn’t you reply in the presence of Mr. Sankary and Mr. Vader and Mr. Buono, ‘I know they are smuggling birds. You know they are smuggling birds. If called to testify, I will get on the stand and lie about it?’ No, Sir, I did not. And I will take a lie detector test, Sir.

Mr. Bowler: I move to strike that.

The Court: Mr. Duke, I have continually asked you not to make comments. You keep on making them.

The Witness: I am sorry, your Honor.

The Court: Stop being sorry and stop making the comments. If you make any more you are going to be punished for contempt.”

It is appellant Duke's claim that the question objected to here was an attempted impeachment and was not followed up and this was a deliberate attempt by the prosecutor to put otherwise incompetent evidence before the jury. Appellant Duke's conclusions as to the motives of the prosecutor in propounding the complained of question, are pure surmise. An affirmative answer to the question would have shown knowledge of the bird smuggling ring, thus going to the heart of the conspiracy charges here. However, this question need never be reached by this Honorable Court since, as in the prior misconduct ground (*supra*) the question was not preserved for appeal by a timely objection (Duke Br. 12). Nor in fact did the prosecutor commit misconduct during the course of the trial. One of the outstanding features of the Anglo-Saxon Juridical System is the independent role allowed counsel on trial. It is there the privilege and duty of an attorney to vigorously prosecute his cause within all fair bounds. It is not desirable to hold too tight a rein on counsel's presentation and since, during the heat of argument in the court room, many things are said and done which seem somewhat short of desirability when reviewed in the calm of an appellate court, it is generally conceded that the conduct of counsel in the trial of the case is a matter normally left to the regulation of the trial judge who has unequalled opportunity to see and evaluate the impact of counsel's conduct in the forum. In this field the trial court's discretion is nigh absolute, and absent a palpable abuse, will not be reviewed by an appellate court. (*Iva Ikuko Toguri d'Aquino v. United States* (1951, 9th Cir.), 192 F. 2d 338, reh. den. 203 F. 2d 390, reh. den. 73 S. Ct. 786, 345 U. S. 931, 97 L. Ed. 1361, cert. den. 72 S. Ct. 772, 343 U. S. 935, 97 L. Ed. 1343, reh. den. 72 S. Ct. 1053, 343 U. S. 958, 96 L. Ed. 1358; see also, *Pogy v. United States* (1938, 6th Cir.), 96 F. 2d 734, cert. den. 59 S. Ct. 68, 305 U. S. 608, 83 L. Ed. 387.)

The foregoing is true not only of general conduct of counsel but it applies equally to arguments and other phases of the case. Thus whether a line of questioning permitted by the trial court constitutes reversible error, is a question for the Court of Appeals, based upon the entire record. (*Morgan v. United States* (1938), 98 F. 2d 473, and cases cited at page 477.) Accordingly, not every error or instance of misconduct committed by a prosecutor is considered to be reversible error. Particularly, over the course of an extended trial such as the instant case, error of greater or lesser form is almost certain to be insinuated into the record in some manner or other. To reverse in each such case, absent clear uncontroverted showing of prejudice, would be to render impotent the criminal judiciary. Of particular applicability in this connection is the language of the Second Circuit in *United States v. Hiss* (1950, 2nd Cir.), 185 F. 2d 822, cert. den. 71 S. Ct. 532, 340 U. S. 948, 95 L. Ed. 683, viz:

“Where a prosecutor is charged with conduct so prejudicial as to amount to reversible error, the charge should be made good by showing a successful effort to influence the jury against the defendant by some means clearly indefensible as a matter of law. It is not enough if there are no more than minor lapses throughout a long trial. *United States v. Socony Vacuum Oil Co.*, 310 U. S. 150, 239-240, 60 S. Ct. 811, 84 L. Ed. 1129. Cf., *United States v. Buckner*, 2 Cir., 108 F. 2d 921, 928, cert. den. 309 U. S. 669, 60 S. Ct. 613, 84 L. Ed. 1016.”

While in the instant case there is a bare allegation of prejudice resulting from the prosecutor's conduct, such allegation falls far short of the requisite showing of a successful effort to influence the jury against the defendant.

Third, the third and fourth instances of misconduct purportedly occurred by reason of certain remarks of the prosecutor during opening argument. The third instance assigned is that portion of the argument in which the prosecutor stated [Tr. 4433]:

“Mr. Ballard, with respect to Desert Center, says ‘I wasn’t there.’ The inference on both defenses, of course, is that the government witnesses were mistaken or that they for some reason, did not tell the truth.

The same cannot be said by Duke. Duke says, starting with myself, if you please, as a U. S. Attorney, going to a former Assistant U. S. Attorney—I misquote myself Assistant U. S. Attorney—Mr. Vader, Chief Customs Agent of San Diego, and various and sundry labor people are permeated with fraud.

I resent it, and I have resented it right along, but there was nothing I could do about it. There is now, though.

He made those accusations and didn’t put any evidence on of any competent proof.

Just threw it out, ‘there is a bunch of them in on it, conspiracy, he says.’ Maligning people on rumor or on hearsay, speculation; no proof whatsoever.

He pointed the accusation at Mr. Vader of wrongful misconduct, of framing evidence, of bringing in perjured evidence. Mr. Vader is right here. Mr. Vader was on that stand and he did not ask one single question of Mr. Vader pertaining to that point. I was on there twice, mind you, not a word; not a word. He was afraid to ask us.

How about that other one, Mr. Sankary, who occupied the same job I have? He conducted the case back in the year 1953 and left the office at that time. No further contact with the office. But another arch-

conspirator. Duke had him under subpoena before this trial started, mind you, and never called him, not once, so I called him. I put him on the stand and I asked him a little background information so you would know for sure it was the same fellow.

‘Your witness, Mr. Duke.’ What did he say? ‘Did you have a telephone conversation with Judge Solomon on March 28th?’ ‘Yes.’ Had he talked with Steward since that time? ‘Yes.’

No further questions. He didn’t ask that man a question, so I started to, to give you a true picture, and I was very properly stopped, because, ladies and gentlemen, so the Court says, it would make no difference if they were fighting a duel the entire year of 1953.

What sort of a government does Duke think we have here, that people go around deliberately framing people. Mr. Bowler’s name has been brought into this, and why I don’t know. What sort of corrupt organization must he think we have?

We have the Customs Service; corrupt, framing evidence. The United States Attorney’s office participating in it, and citizens in San Diego participating in it. And it must have been somehow with the collusion of the grand jury.

It is absolutely the lowest attack I have ever seen or even heard of, because there has been no evidence, and he knew there was no evidence. Let’s just take a couple of instances.

The Court: I don’t think you should labor that, Mr. Steward.

Mr. Steward: Very good.

The Court: If there was no evidence, don’t talk about it.

Mr. Steward: I won’t, your Honor.

The Court: Argue the evidence we do have.”

Any damage done by this argument (and we admit of none being done) was cured by the Court's admonition at the close of the argument. However, it is submitted that such a comment was invited by the comment of appellant Duke throughout the trial (see discussion of Duke's "special defense," *supra*). Indeed, the trial judge specifically so commented when appellant Duke sought to have him cite the prosecutor for misconduct, viz. [Tr. 4467-4468]:

"Mr. Duke: It was well in mind, your Honor, but for the closing remarks of the prosecutor yesterday, which, as I stated yesterday, I thought were highly improper because—

The Court: I think you invited those, Mr. Duke, throughout this trial. You have, by innuendo and by suggestions and by offers, suggested the matter so that there was an invitation. I don't think Mr. Steward should have accepted the invitation yesterday. He should have waited until closing and see if you brought it out in rebuttal. But there was nothing prejudicial or which would amount to misconduct in it."

It is clearly established in the Federal courts that a prosecutor's argument to be reversible must not only have been plainly unwarranted, but also clearly injurious.

Mellor v. United States (1946), 160 F. 2d 757;

See also:

Bratcher v. United States (1945), 149 F. 2d 742;

Weiss v. United States (1941), 122 F. 2d 675;

Pietch v. United States (1940), 110 F. 2d 817,
cert. den. 60 S. Ct. 1100, 310 U. S. 648, 84 L.
Ed. 1414.

Neither element is present here. There was no misconduct in this respect.

Fourth: It is alleged that the prosecutor committed misconduct by expressing personal belief in appellant Duke's guilt (Duke's Br. 66). Apparently, it is claimed that the prosecutor said "that Duke participated in the bird smuggling venture and the grand jury indicted him for doing that" [appellant cites Tr. 4444, but apparently means Tr. 4445, lines 5 to 10]. The remarks were merely passing reference and cannot be said to be sufficiently called to the attention of the trial court by the fragmentary assignment [Tr. 4467]. Additionally, it is the position of appellee that such remarks are in no way prejudicial nor do they constitute misconduct.

It is submitted by appellee that in view of the premises no misconduct, prejudicial or otherwise, was committed by the prosecutor in any of the particulars assigned by appellant Duke.

There Was No Error Committed by the Court in Commenting on the Evidence While Charging the Jury.

Appellant Duke contends that the Court committed error in commenting on Duke's so-called special defense while charging the jury. No argument is advanced in support of this contention, said appellant merely posing the bare question "for what reason should the jury 'consider the accusation' the court having ruled that there was no affirmative evidence to support it?" It is evident that this contention has its genesis in appellant Duke's claim that his prosecution was the result of a conspiracy to "frame" him. This is the so-called "special defense" which has heretofore been discussed at greater length *supra*).

The initiating factor in this contention occurred at the close of testimony when the Court entertained motions by various counsel. At this time the Government moved to strike certain testimony on the ground that while it had been admitted to prove a conspiracy to convict Duke

by perjured testimony, the evidence as a whole failed to show any "frame up" or conspiracy for this purpose [Tr. 4224, *et seq.*]. Following some argument, the following colloquy took place [Tr. 4245-4246]:

"The Court: Of course, that evidence was received here at the time when there had been a great furor about the defense was going to prove there was a frame up, and that this evidence against the defendant was perjurious and had been procured as a result of the frame up, and they were going to connect the labor headquarters to it; in fact, connect Mr. Vader to it and Mr. Sankary and so on.

When it finally developed, it turned out to not be spelled out at all. However, it is in, the jury has heard it.

How can we erase it from their minds? Even if I strike it now, as a technical matter, how can I erase it from the jury's minds? They have heard a lot of smoke screen here.

Mr. Bowler: We won't ask you to erase it. Strike the evidence. It will prevent them from arguing; that is a point.

There is no use confusing the jury more on the situation. We would be satisfied if it were just stricken from the record. Counsel will know.

It seems to me, if it is hearsay, it is hearsay, and it shouldn't be in there, your Honor. If your Honor was misled in admitting it, if that same proposition was presented to your Honor right at this point, I am sure your Honor would sustain the objection to it. I don't think there would be any question about it.

I still think it is a question for the court on admissibility of evidence. It is hearsay of the rankest kind. It shouldn't be in that record.

The Court: Motion granted."

Additional argument was then entertained which showed that the testimony which was the subject of the motion to strike, was so intertwined with other valid testimony that attempts to strike the objectionable testimony *en toto* might give rise to substantial questions on review [Tr. 4247-4271]. Ultimately, the practical solution adopted by the trial court was to reinstate the stricken testimony but reserve the right to comment upon it. Thus it appears, at page 4272, *et seq.*, of the transcript:

“Mr. Bowler: . . . I know your Honor would never have admitted that kind of evidence unless those statements have been made. And there has been no proof of any conspiracy or frame up involving any union officials or the United States Attorneys or the Customs Bureau.

Mr. Fitzgerald: If the Court please, counsel now criticizes us on that, and yet he was the one that made the objection when proof was offered to show a conspiracy on the part of some labor unions.

The Court: Well, I heard an awfully long offer of proof and it didn't prove anything which had any bearing upon this case.

* * * * *

The Court: I assumed when it started out your gentlemen knew where you were going, and that you were going to develop the skeleton of the defense which had been suggested.

But after we had gotten into it a little way, then I stopped having the jury here and heard that last witness—I forget his name now—out of the hearing of the jury, to determine whether there would be enough that, assuming every word of it were true, there would be a proof of a frame up.

And you haven't even a suggestion of a frame up, as a matter of law . . .

The Court: There is no testimony that he [appellant Duke] would be wrongfully indicted upon perjured testimony, and that perjured testimony would be produced against him here."

The Court then resolved the matter by stating, at page 4277 of the transcript:

"The Court: I should think, gentlemen, as a matter of practical justice, instead of these motions to strike, it would be better for you to invite the Court to comment upon the evidence of Hadzima, and let the evidence stay in.

Mr. Bowler: I was just thinking the same thing. That certainly would be a case where the evidence as it is in the record—a case to comment on to the jury, that the jury should only consider admissible evidence.

* * * * *

Mr. Bowler: In view of the Court's remarks, we will withdraw our motion to strike the testimony of Buono the morning of August 7, 1955" [Tr. 4278].

* * * * *

"The Court: Of course, I have granted the motion, but I revoke the ruling and reinstate the testimony of Buono.

Mr. Bowler: All right.

The Court: I warn you I am going to comment on the witness Hadzima, and not in any terms which will compliment him."

From the foregoing it is apparent that appellant Duke is not quite accurate in the assumption implicit in the propounded query that the Court had excluded from the consideration by the jury the testimony which related to his efforts to prove a conspiracy against him. While initially stricken, said testimony was ultimately allowed to

go to the jury with appropriate comment by the Court. All appellants were forewarned of the intention of the Court to so comment [Tr. 4277-4279], and raised no objections to the proposed procedure. Pursuant to this announced and unopposed intention, the Court stated in his charge as follows:

“It has been said here by some of the counsel that certain of the Government witnesses have, in effect, conspired together to tell false stories.

Now, if a man told a false account of things here, of course, the ultimate fact which would cause your rejection of it would be that he told a false account, regardless of whether it was something on his own account that caused him to do it, or whether it was conspiracy. But it has been strongly suggested to you by some of the counsel that certain of these witnesses did conspire together, and in that connection you should consider that accusation. Consider whether the situation of those witnesses was such that they would have the opportunity to do so. What access they had to each other and what lack of access they had to each other.

Persons in the penitentiary are under some restraint and some degree of unavailability to others. Consider that fact. Consider also that, notwithstanding the unavailability generally, there are extents of availability. Try to analyze it and come to the decision as to whether you can believe all or any part of the testimony, and then if you find you can accept some or all of the testimony, measure that testimony to the language of the indictment and see whether it establishes the charges, or any of them, which have been made in that indictment.” [Tr. 5089.]

It was only upon completion of the entire charge that the appellant Duke made known his objection to the

Court's comment, at which time he refused the proffer of any necessary amplification, viz.:

"The Court: Anything else?

Mr. Duke: Yes. Your Honor, I want, just for the record, to enter some exceptions, if it please the Court.

One would be to the Court's statement to the jury consider of the witnesses had any opportunity to get together.

The Court: If it is simply exception and not a request for amendment, state it as an exception. If you request amplification in some way, you can expand on it to whatever extent is necessary, though. If you are simply excepting to something, state it as an exception briefly.

Mr. Duke: I don't think that the matter should be commented upon at all. I except."

By this action appellant Duke withheld his objection from the attention of the Court until the charge was given, and only then did he make his exception known. By his silence and his refusal to accept amplification he precluded any correction (assuming, *arguendo*, any is necessary), and is thus in the position of attempting to raise initially on appeal an objection which was not timely called to the attention of the trial judge.

However, even if this Honorable Court holds that appellant Duke's above quoted exception sufficiently saved the question for review, the comment of the Court is patently proper under the prevailing rules in the federal courts which allow the trial judge to comment on the evidence when charging the jury.

One of the earliest cases supporting this rule is that of *Rucker v. Wheeler* (1888), 127 U. S. 85, wherein Mr. Justice Harlan stated at page 93:

“It is no longer an open question that a judge of a court of the United States, in submitting a case to the jury, may, in his discretion, express his opinion upon the facts; and that ‘when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury,’ such expressions of opinion are not reviewable on writ of error. *Vicksburg, etc., RR. v. Putnam*, 118 U. S. 545, 553; *St. Louis, etc., RR. v. Vickers*, 122 U. S. 360; *United States v. Reading RR.*, 123 U. S. 113, 114.”

Perhaps the best known expression of this federal rule is that of Mr. Chief Justice Holmes in *Quercia v. United States* (1933), 289 U. S. 466, wherein he sets out, not only the privilege of the rule, but also its inherent limitations. At page 469 of the United States Report it is stated:

“In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. *Herron v. Southern Pacific Co.*, 283 U. S. 91, 95. In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, but drawing their attention to the parts of it which he thinks important; and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination. *Carver v. Jackson*, 4 Pet. 1, 80; *Vicksburg and Meridian RR. Co. v. Putnam*, 118 U. S. 545, 553; *United*

States v. Philadelphia & Reading Co., 123 U. S. 113, 114; Capital Traction Co. v. Hof, 174 U. S. 1, 13, 14; Patton v. United States, 281 U. S. 276, 288. Sir Matthew Hale thus described the function of the trial Judge at common law: 'Herein he is able, in matters of law emerging upon the evidence, to direct them; and also, in matters of fact to give them a great light and assistance by his weighing the evidence before them, and observing where the question and knot of the business lies, and by showing them his opinion even in matters of fact; which is a great advantage and light to laymen.' Hale, History of the Common Law, 291, 292. Under the federal Constitution the essential prerogatives of the trial judge as they were secured by the rules of the Common Law are maintained in the federal courts. Vicksburg and Meridian RR. Co. v. Putnam, *supra*; St. Louis, I. M. & S. Ry. Co. v. Vickers, 122 U. S. 360, 363; Slocum v New York Life Insurance Co., 228 U. S. 364, 397; Herron v. Southern Pacific Co., *supra*; Gasoline Products Co. v. Champlin Co., 283 U. S. 494, 498.

"This privilege of comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguard against abuses. The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' This court has accordingly emphasized the duty of the trial judge to use great

care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided'; that 'deductions and theories not warranted by the evidence should be studiously avoided.' "

In *Minner v. United States* (1932, 10th Cir.), 57 F. 2d 506, the Court, in holding that the trial judge had abused his right of comment, Court stated, at page 513:

"In so holding we do not intend to limit the right of a trial judge to properly sum up the facts and express his opinion thereon. To do so is not only his right but, in many cases, his duty. As said by the court in *Rudd v. United States* (C. C. A. 8), 173 Fed. 912, 914: 'A judge should not be a mere automatic oracle of the law, but a living participant in the trial, and so far as the limitations of his position permit should see that justice is done.' But in summing up and commenting on the evidence, the trial judge should be governed by certain well recognized limitations inherent in the very nature of the judicial office. He should state the evidence fairly and accurately, both that which is favorable and that which is unfavorable to the accused. His statements should not be argumentative, but impartial, dispassionate, and judicial; and they should be so carefully guarded that the jurors are left free to exercise their independent judgment upon the facts."

See also the following cases of this and other Circuits applying the above-stated rule:

United States v. Rosenberg (1952, 2nd Cir.), 195 F. 2d 583, cert. den. 73 S. Ct. 20, 21, 344 U. S. 838, 97 L. Ed. 652, reh. den. 73 S. Ct. 134, 180, 344 U. S. 889, 87 L. Ed. 687;

United States v. Aaron (1951, 2nd Cir.), 190 F. 2d 144, cert. den. 72 S. Ct. 50, 342 U. S. 827, 96 L. Ed. 626;

Lovely v. United States (1949, 4th Cir.), 175 F. 2d 312, cert. den. 70 S. Ct. 38, 338 U. S. 834, 94 L. E.;

Myers v. United States (1949, 8th Cir.), 174 F. 2d 329, cert. den. 70 S. Ct. 91, 338 U. S. 849, 94 L. Ed.;

Fredrick v. United States (1947, 9th Cir.), 163 F. 2d 536;

United States v. Stoehr (1951, D. C. Pa.), 100 Fed. Supp. 143, and authority contained in Notes 17, 18 and 19, pages 152, 153, affd. 196 F. 2d 276, cert. den. 73 S. Ct. 28, 344 U. S. 826, 97 L. Ed. 643.

From the above-cited cases it is clear that it is only where the Court abuses its right to comment on the evidence that an Appellate Court will consider a reversal on this ground. As examples, the following comments have been held to constitute reversible error.

In the *Quercia* case, *supra*, the following comment was made by the court:

“And now I am going to tell you what I think of the defendant’s testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don’t know, but that is the fact. I think that every single word that man said, except when he agreed with the Government’s testimony, was a lie. . . .

“Now, that opinion is an opinion of evidence and is not binding on you, and if you don’t agree with it, it is your duty to find him not guilty.”

In *Wheatley v. United States* (1946, 4th Cir.), 159 F. 2d 599, the Court in charging the jury stated:

“Now, you have heard the testimony here of this defendant as to the situation in the place where he said he was gambling and drinking, and you heard the proprietor of the place say there was no gambling there, no drinks sold there at all. The old man said he was drunk, drinking wine, doesn’t know what happened. Bear in mind that he did take money out of his pocket and pay the toll keeper at the bridge the toll. He knew what it was and gave him the toll, and when he succeeded in having this Denzil Wilson take him where he wanted to go, he threw a quarter on the cushion to pay the toll back into West Virginia. Was he so drunk he didn’t know what he was doing? If he was, how did he know what the toll was going over there, if he was so drunk he didn’t know what he was doing, how did he know to throw a quarter in there to pay the toll back?

“Now, gentlemen, I could go on—I am very much interested in this case—but I don’t think it is necessary with gentlemen like you to consume more of your time and mine. If you believe this defendant, at the point of a knife sticking in the side of the driver of the car, forced him to take him across the river and to his home, the minute he crossed the river he was guilty of violating this Lindberg statute, 18 U. S. C. A. 408(a), *et seq.*”

Considered in the light of the foregoing authorities the exceedingly moderate comment of the trial court can in no way be construed as either harmless or plain error

(18 U. S. C. A. Rule 52). This portion of the charge served not only the purpose of calling to the attention of the jury the defensive theory urged throughout the proceeding below by appellant Duke, but also of further directing the attention of the jury in their deliberations to the possibility of collusion between the Government's witnesses. It is to be noted that when particularizing the opportunities for such collusion the Court was careful to point out that while there is some general restraint on mutual availability in penal institutions (where some of these witnesses were held) the possibility of such opportunities existing was not to be precluded. Additionally, the Court scrupulously instructed the jury that comments of the Court were not to be considered by them in the exercise of their prerogatives as the sole trier of fact. At page 653 of the transcript the following interim instruction was given:

"The Court: From time to time I give you these little interim lectures on the law so final instructions will not be too unduly extended and burdensome. But you should never get the idea that by telling you one of these things that the Judge is pulling for or against one side or the other. I sit here impartially, insofar as jury cases go. I never undertake to indicate to the jury a feeling that one side or the other is prevailing."

* * * * *

"I did not mean to say that the evidence does or does not point one way or the other in that regard. That is the question for you. But it is my duty to tell you the law and when I tell you the law is a certain way it doesn't mean that I am undertaking to influence your decision. . . .

There is only one person in the Court who has a right to decide these questions of guilt or innocence and that is a collective person which is made up of the twelve who constitute the jury, regardless of what the judge might feel. It is the jury that decides the case. What the judge feels is not to be taken by the jury—in other words, it isn't that I sit here talking about the case to you, and you simply reflect it back and make it official. You are not the censor of my feelings, because so far I haven't permitted myself to come to any decision on any matters except certain little interim matters. But on the big questions in the case I haven't permitted myself to come to a decision, and you should not interpret any of my acts as indicating that I have come to a decision; then you should bear in mind at all times that it is your responsibility and not mine."

At the commencement of the charge to the jury itself, the Court again admonished the jury as to the status of his comments on the evidence when he stated, at page 5055 of the transcript:

"It has been my duty to rule on admissibility of evidence, and that has been guided by legal standards, but I have no right to decide the facts. The law allows a federal judge to comment on the facts. If I should do that you must bear in mind that it is only comment, because the law also provides that the jury shall be the sole and exclusive judge of the facts, which means that, even if you think the judge has an opinion about any fact issue in the case, you are not to just sit there and reflect the opinion of the judge because, so far as the facts are concerned, you are the judge.

That is said to you collectively because it means that twelve of you are the judge. Yet it means that

every juror must agree with the verdicts which are returned, because all the parties to the lawsuit in the judicial system itself are entitled to have the individual opinion of each juror. But until those individual opinions are unanimous among the jury, they do not justify a verdict.

No court in the land can ever decide the facts differently than the way the jury decides them. If, for instance, a case goes up to the Supreme Court, the Supreme Court will decide the questions of law, but it never decides that a jury was wrong on matters where the facts are in dispute, because of all questions of decisions on facts which are in dispute have to be by the jury.”

By these instructions the Court guarded the right of the jurors to exercise their free and independent judgment upon the facts.

Appellant Duke has failed beyond the bare allegation of impropriety to specify in what way the comment of the Court was allegedly improper or constituted error. Such a failure is in violation of Rule 18(2)(d) and (e) of this Honorable Court (Rules of the United States Court of Appeals for the Ninth Circuit 18(2)(d) and (e)). However, in any event, it is submitted that, read in its entirety, the complained of portion of the charge was, in the light of the foregoing authorities, fair, moderate and permissive comment, without prejudice to appellant Duke, and can in no way be held to be error.

There Was No Error Committed by the Court in Refusing to Admit Evidence Bearing on the Motive of Witness Hadzima and Based Upon Collateral Matters Related in a Certain Telephone Conversation.

An attempt was made by appellant Duke during the trial to put in evidence the contents of a certain telephone conversation. A recording had allegedly been made of this conversation which transpired on August 7, 1955 (during the progress of the trial), between appellant Duke and Buono on one end and a government witness, John Hadzima, on the other. The recording (made by appellant Duke) was introduced into evidence and is set out at various places in the transcript [Tr. 2048-2098, 2107-2156]. The conversation was, on the whole, relatively unintelligible, consisting largely of veiled statements, hints, and innuendo. Appellant Duke is of the opinion that it proved or tended to prove the existence of an illegal conspiracy to convict him. At best, it was a recitation of opinions and conclusions both of fact and law, of the witness Hadzima. The Court in admitting the recording indicated that it was received solely for the limited purpose of impeaching Hadzima and the jury was so instructed [Tr. 2037, 2038, 2041, 2044, 2098, 2099, 2657, 4291, 5100 and 5101].

In cross-examining the witness Hadzima prior to the time the recording of the telephone conversation was produced, appellant Duke questioned him about statements he had allegedly made in the said telephone conversation. Upon objection the Court ruled that the question was improper for cross-examination and indicated that the correct procedure would be to produce the recorded conversation during the development of the defendant's case and not initially upon cross-examination, viz. [Tr. 957]:

"The Court: I think if there were conversations in which a witness, a prospective witness, in substance, said to a defendant, that he, the witness, was

a party to a frame-up on that defendant, then it is for the defendant to offer that affirmatively as his defense and if the witness is able to rebut it, he should be called in rebuttal.

But it should not be introduced for the first time in cross-examination of the witness who has not referred at all in his direct testimony to the conversation.

Mr. Duke: Your Honor would suggest I desist from that line of questioning about the telephone conversation then?

The Court: Yes.

Mr. Duke: Thank you, your Honor. I may say here, for the benefit of—

The Court: If there was such a conversation it is for you to bring forth as part of your case."

Appellant Duke interprets the above quoted language as an order on the part of the Court to prove the subject matter of the conversation affirmatively as a defense. It is submitted that the above quoted statement of the Court cannot logically be tortured into an order to appellant Duke to do anything other than to desist from the line of incompetent questioning he was then endeavoring to pursue. Certainly, the statement cannot be perverted into any kind of a representation that if propounded during the defense the questions would automatically be allowed. The Court's statement is limited to suggestion that since such questions are improper on cross-examination, they must be propounded if at all during the defendant's case. The remarks go solely to the propriety of the time the questions were asked. They in no way pretend to decide the sufficiency, competency, materiality, or relevancy of the questions. Such matters were to be considered only when the questions were asked. The ruling could not properly be anticipated. Appellant Duke

was not promised automatic admissibility on the subject of his questions.

While it is true that showing bias of a witness is an accepted mode of impeachment, the attempted proof in this case was based upon a recording admitted for a limited purpose (impeachment). The offers of proof show in effect an attempt to introduce collateral matters rather than to affirmatively show a legitimate manifestation of bias upon the part of Hadzima. No error was committed in this particular.

There Was No Error Committed by the Court in Refusing to Admit Evidence Tending to Prove That During a Specific Period Appellant Duke Was Heavily in Debt and Had to Borrow Funds From the Bank to Meet Current Expenses.

In his third specification of error, appellant Duke specifies the ruling of the Court in refusing to admit the testimony of Duke's former law associate to the effect that during a specified period Duke was heavily in debt and had to borrow funds from the bank to meet current operating expenses. This testimony was sought to be introduced to rebut the testimony of the witness Hadzima, that during the same period he had delivered to Duke "fabulous sums of money" (Duke Br. 35) receipt of which Duke had denied. Although contained in the specification of error this ground is nowhere argued in the argument. Accordingly, it is not clear in what way appellant Duke contends that he was prejudiced by the error of such ruling if any (and we contend there was no error). Suffice to say the materiality of such a question is not readily apparent. A responsive answer to the question would, at best, be material to appellant Duke's allocation of funds rather than his acquisition of them. The trial court committed no error in excluding the proffered evidence.

There Was No Error Committed by the Court in Refusing to Permit Proof That Immediately Prior to the Trial a Government Witness Had Been Engaged in Illegal Operations for Which He Had Not Been Prosecuted.

Appellant Duke next contends (Duke Br. 71) that the trial court erred in refusing to permit him to prove that the witness Robert Helm was, immediately prior to trial, engaged in certain export activities which were claimed to be illegal under United States law by appellant Duke. Briefly, the evidence showed that within a day or two of the commencement of the trial witness Helm who was an aviator received a cargo of whiskey from a government Customs warehouse at San Diego. The whiskey had been stored in a bonded warehouse, that is, while physically present in the United States, it was in effect in a free zone no duty having been paid on it. It was Helm's intention, according to him, to fly the whiskey from San Diego, California, into Mexico for a Mexican company named Importadora de Sinaloa. Since the whiskey was taken from the bonded warehouse for the purpose of export no American duty was required. Appellant Duke sought to prove that Helm was in fact engaged in a smuggling transaction. In support of his theory he offered to prove that Helm had crashed his airplane just on the Mexican side of the border. This was admitted by Helm but his version of the story was that while flying the whiskey into Mexico for Sinaloa he had developed engine trouble and had crashed in a desolate area about three miles south of the border. Duke claims that Helm landed the whiskey at the locale of the crash, had unloaded it, and then crashed while taking off [Tr. 1322-1335]. It is Duke's claim that Helm was in fact engaged in illegal smuggling activity and that this activity was carried on with the knowledge, consent, and approbation of Chief Customs Inspector Rae Vader. Appellant Duke

therefore claims that he should have been permitted by independent proof to show this as bearing on the bias and motive of the witness Helm. The Court restricted the offer of such proof on the ground that it was collateral to the main case [Tr. 1332]. Specifically, the Court approved an objection of the prosecutor to the effect that appellant Duke must first prove Helm's activity to be an illegal smuggling activity before he could go into any collateral matters in connection with the transaction [Tr. 1330]. It is submitted by appellee that whether Helm's activities constituted an illegal smuggling activity under the laws of Mexico is immaterial in the instant case. Appellant's argument can only have efficacy if a violation of the laws of the United States be made out and then only with the knowledge of a person who, in position to prosecute, wilfully and maliciously refuses to so do. Appellant cites *Farkas v. United States* (1922, 6th Cir.), 2 F. 2d 644, which merely holds that the state of mind of a witness as to hope or belief that he will secure immunity or a lighter sentence or other favorable treatment in return for his testimony, is proper evidence tending to show the existence of such hope or belief. Appellant attempted examination of witness Helm on purely collateral issues. They went not merely to his state of mind as in the *Farkas* case (*supra*) but attempted to show acts of misconduct unrelated to the instant case. In this respect, this Honorable Court has long since applied the well-known rule which it has quoted with approval from 1 Greenleaf (16th Ed.), Section 461(a):

“It has long been settled the testimony from other witnesses of particular instances of misconduct is an improper mode of discrediting because of the confusion of issues and waste of time that would thus be involved, and because of the unfair surprise to the witness, who cannot know what variety of

false charges may be specified and cannot be prepared to expose their falsity. This rule excluding proof by other witnesses is well settled and everywhere accepted.”

McCune v. United States (1924, 9th Cir.), 296 Fed. 480, 481; citing also *Jones on Evidence*, Sec. 840;

Daniels v. United States, 196 Fed. 459;

Bullard v. United States, 245 Fed. 837;

Fisk v. United States, 279 Fed. 12.

See also:

Hanover Fire Insurance Co. v. Dallavo (1921, 6th Cir.), 274 Fed. 258, 266.

Here too, the possibility of confusion by introduction of the collateral issues more than outweighed any importance such evidence might have had as to proving bias on behalf of witness Helm. The Court committed no error in this respect.

There Was No Error Committed by the Court in Permitting Hadzima to Have the Advice of Private Counsel While Testifying.

The next ground alleged as error by appellant Duke is that the Court committed error in permitting John Hadzima to confer with his private counsel Harold Lasher while he was testifying in the instant case (Duke Br. 73, 74). Specifically, appellant Duke objects to the fact that when asked by Duke on cross-examination a question concerning his finances during the years 1953 and 1954, Hadzima on advice of counsel refused to answer the question. Additionally, Duke points out that when Hadzima was being cross-examined by Mr. Whelan on behalf of appellant Ballard, Mr. Lasher conferred with Hadzima

as a result of which Hadzima stated he wished to correct a previous statement given in answer to a prior question.

While it may be conceded that a witness has no absolute right to aid of counsel when testifying at a trial, the authorities nowhere prohibit such representation if the Court acquiesce.

In re Black (1931, 2nd Cir.), 47 F. 2d 542, 543;
United States v. Blanton (1948, D. C. E. D. Mo.),
77 Fed. Supp. 812, 816-817.

It cannot therefore be said that the Court by the mere act of permitting counsel to advise a witness while testifying, *per se* prejudiced the appellants. Such prejudice, if any, must affirmatively be shown independently. A review of the record at the time witness Hadzima was being advised by attorney Lasher clearly shows no prejudice resultant to appellant Duke. While appellant Duke alleges that he objected to attorney Lasher's presence, it is apparent that the objection went to the fact that attorney Lasher was also under subpoena as a witness and would be present in violation of the Court's order excluding witnesses [Tr. 466, 467, 468]. The initial objection on behalf of defendant Duke which went to the propriety of Lasher's presence in the courtroom as counsel for Hadzima, did not occur until Mr. Fitzgerald objected at page 932 of the transcript.

Appellant Duke objects to the fact that while Hadzima was permitted upon his direct examination to testify that he had paid Duke sums of money in 1953 and 1954, an attempt by Duke on cross-examination to question Hadzima "with reference to his finances during the years 1953 and 1954" (Duke Br. 74) was objected to and the objection sustained. However, it is apparent from the transcript that Duke first asked the question "And would you tell me, what was the total amount you received

from any illegal enterprises in the year 1953?" [Tr. 931]. This question was not objected to and it is submitted inasmuch as Hadzima testified on his direct examination to having paid sums of money to Duke from illegal enterprises, that question is pertinent and correct. However, the following question asked by Duke is subject to an obvious vice, viz.: [Tr. 931], "by Mr. Duke: During the year 1953, *how much money did you make?*" A responsive answer to this question would go beyond the normal scope of the direct examination. The direct examination had been concerned not with the total amount of money earned by the witness Hadzima in any given year but the total amount earned by the witness Hadzima from illegal enterprises. An answer to the propounded question clearly hold the seeds of self-incrimination. Recognizing this Mr. Lasher asked to confer with his client [Tr. 932] and as a result Hadzima refused to answer the question on the ground that it might incriminate him [Tr. 932]. At that point the Court observed [Tr. 933]:

"I think the vice of the question is, Mr. Duke, you asked him how much he made, calling for a *total income*. You started out directing your question to income from illegal smuggling transactions.

"Possibly if you will revert to that line of questioning the privilege will not be claimed." [Emphasis added.]

Pursuant to the suggestion of the Court, appellant Duke next questioned witness Hadzima regarding the amount of money he had earned as a result of illegal importation of merchandise. When witness Hadzima attempted to invoke the Fifth Amendment grounds in support of his refusal to answer, the Court stated [Tr. 933]:

"The Court can't recognize that, Mr. Hadzima, because you have gone so far in your testimony. You can't just open the door a little way, stick a hand

through and then refuse to come through the rest of the way. That is what you are, in effect, doing.

You have been on the witness stand now almost a day and a half of regular court hours, testifying largely in this area. I believe this question is proper cross-examination within an area that you have testified to freely, without interposing an objection, so you will have to answer this question.”

At this point the Court made clear the limited role in which Hadzima’s counsel, Mr. Lasher, was appearing. The following colloquy took place [Tr. 933-934]:

“Mr. Lasher: I wonder if I may make this statement, your Honor—

The Court: No, you are not participating in the trial of this case. You are advising a client.

The Court has ruled respecting the necessity of his answering this question.”

Patently, the rulings of the Court in this connection were correct. While appellant Duke was free to cross-examine Hadzima in regard to the amount of money he had earned or paid to Duke as a result of illegal enterprises, a question going to his entire income for any set period possessed definite incriminatory aspects in that it could possibly form the basis of a future Internal Revenue prosecution.

Appellant Duke also takes exception to the fact that during the cross-examination on behalf of appellant Ballard, after conference with Mr. Lasher, witness Hadzima stated that he wished to correct an answer to a previous question. Duke claims “This was error. Defendants were entitled to have the testimony of the witness, not his counsel.” (Duke Br. 74.) The complained of testimony occurred as follows. Witness Hadzima was asked [Tr. 888], “Were you told by anyone connected by the

government that the case pending against you now, where you, Pursselley and Ballard are jointly named as defendants, would be dismissed as far as you are concerned if you gave testimony in this case?" Answer, "No, sir." Subsequently, attorney Lasher conferred with witness Hadzima as a result of which witness Hadzima stated [Tr. 889]:

"I wish to correct my statement, your Honor.

The Court: What statement do you wish to correct?

The Witness: What I just said. My attorney told me that I had assurance that I would not be prosecuted, that the case would be dropped.

The Court: Did you know that?

The Witness: Yes, he told me something to that effect yesterday.

The Court: The case that still is pending?

The Witness: The one that is pending.

The Court: On which you have not been tried or sentenced?

The Witness: Yes, your Honor."

From the foregoing testimony, it is apparent that appellant Duke is put in the position of objecting the very admission he was trying to elicit upon Hadzima's cross-examination, viz: an interest or motive which would show a bias on the part of the witness Hadzima. In this colloquy, the witness has admitted the basis of such a motive in that he has stated that he has been promised immunity. He further stated that he knew that. Thus, the inference could be drawn by the jury that Hadzima's testimony was colored by this knowledge. Evidently, despite that the jury believed his testimony. However, in any event the changed question redounded to appellant Duke's benefit. He was not prejudiced thereby and cannot complain. There was no error committed in this particular.

There Was No Error Committed by the Court in Refusing to Give the Requested Interim Instruction.

Appellant Duke's sixth specification of error (Duke's Br. 36) is that the Court erred in instructing the jury in refusing to give a requested interim instruction to the effect that if stronger evidence were available to prove a fact, failure of the government to produce such evidence would create an inference that such evidence would be unfavorable to them. This specification although raised as a specification was not argued in appellant Duke's argument. In any event he merely refers to pages of the transcript wherein said instruction may be found. This procedure is in violation of the provision of Rule 18(2)(d) of this Honorable Court which provides in pertinent part:

"When error alleged is to the charge of the Court, the specification shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused, together with the grounds of the objections urged at the trial. . . ."

This rule is not complied with.

However, it appears that the interim instruction requested is found at page 244 of the Clerk's Transcript and provides in material portion:

"You are instructed that the defendant in a criminal case is never required to establish any fact which would entitle him to an acquittal but that at all times the burden of proof is upon the government to produce evidence which convinces you of a defendant's guilt beyond a reasonable doubt. Therefore, if you find that it was within the power of the government to produce stronger and more satisfactory evidence

to prove the fact and the government fails to produce such evidence then you are entitled to infer that such evidence if produced would be unfavorable to the government.”

At page 5110 of the transcript the following colloquy took place in regard to the requested instruction:

“Mr: Duke: . . . I requested, I think we all three requested an interim instruction this morning. I wonder if your Honor had that instruction in mind. We do request that instruction.

The Court: Instructions were to have been offered long ago, and the clerk brought to my attention at 9:30 this morning one had just been filed.

Mr. Duke: This was raised in the argument, your Honor.

The Court: I think I have adequately covered this subject.

Mr. Clerk, note on the face of this it was filed at 9:30 today—it was lodged at 9:30 today.

The Clerk: Yes, your Honor.

The Court: It is rejected in its form for not timely presentation. I covered it in substance.”

Turning to the charge of the Court, the jury was advised as follows [Tr. 5081]:

“Now, you have heard me say, but I will say it again, the burden is always upon the government. The government accuses through the grand jury, which is an instrument of the government.

“The grand jury accuses and the United States Attorney prosecutes. The burden is always upon the prosecution, to show the defendants guilty.

“The defendants are not required to prove their innocence under our system of law. Now, they may

offer proof—they don't have to—they may rest upon a scrutiny of the evidence offered against them or they may offer proof. But in a strict sense they don't offer defenses. They might make contentions. They might offer testimony or other evidence here, but the burden is always upon the prosecution."

In view of the premises it is the position of the appellee that the Court was correct in refusing to give the untimely filed instruction choosing instead to cover it in substance in the charge. There was no error committed in this particular.

There Was No Error Committed by the Court in Refusing a Requested Instruction on Accomplice Testimony.

This ground like the foregoing ground is raised as a specification of error by appellant Duke but not argued further by him. Like the foregoing ground, it is stated in violation of Rule 18(2)(d) of this Honorable Court (*supra*) in that the particulars are not alleged in *totidem verbis* as required therein. Appellant Duke's contention is not clear. He states, at page 37 of his brief, that the Court erred in "refusing to instruct the jury that in the circumstances of this case a conviction may not be had solely on the testimony of accomplices unless such testimony be corroborated by other evidence." It is submitted by the appellee that the following instruction given during the charge of the Court was broad enough to cover the field of accomplice testimony [Tr. 5089, 5090, 5091 and 5092]:

"If the crimes charged in the indictment were committed by any one, then under the evidence in this case and as a matter of law, the following witnesses were accomplices: Nicholas Spicuzza, Ray Curtis, Johnny Hadzima, Robert Helm, George Todd, Mary Ascani. There is a rule regarding the testimony of

accomplices. It is that a conviction may be had upon the uncorroborated testimony of an accomplice if the jury is satisfied beyond a reasonable doubt that the testimony of the accomplice is true and that it establishes the commission of the offense.

“However, the testimony of all accomplices is to be very cautiously received and very carefully scrutinized because of the position which that accomplice has in his former relations or claimed relations with the persons against whom he testifies, so you must carefully examine it and be very cautious about it. But if you do accept it, find that it is corroborated, or even if it isn’t corroborated, if you believe it—of course, if you believe it you accept it—but in determining whether you believe it. I would urgently suggest to you that you check the other evidence to see what extent, if at all, the testimony of accomplices is corroborated by other persons, by the circumstances, by physical facts, by all the other evidence in the case.

“I have been handed up by one of the counsel one of the rules taken from a law book about accomplices, and it reads this way:

“‘Regarding the rule of law that the testimony of an accomplice or co-conspirator is to be scrutinized with caution. You are instructed that this does not mean that such testimony is necessarily to be rejected or necessarily to be accepted, but it is to be scrutinized with care, and unless you are satisfied that it is true, you should not accept it. You should only accept that testimony which you believe to be true. The mere fact that a man is an accomplice or a co-conspirator or that he might have even have moral guilt equal or greater to that of the person against whom he testifies, does not mean that his testimony is to be accepted. The final test is, did he tell the truth.’

“And if he did tell the truth, does that testimony show that the defendant committed one or more of the very specific offenses charged against him?”

“Evidence that a defendant was in the company of or associated with one or more persons alleged or proved to have been members of a criminal conspiracy, standing alone, is not enough to show that such defendant was a member of the alleged conspiracy. In your deliberations you should bear in mind that guilt by association alone is a dangerous doctrine. It condemns one man for the unlawful conduct of another.”

It is submitted there was no error committed by the Court in this particular.

It is further submitted that there was no error committed with regard to appellant Duke and that therefore the judgment of conviction must be affirmed as to him.

Louis Glenn Ballard.

In addition to the jointly raised errors heretofore discussed, appellant Ballard individually makes the following specification of errors and arguments thereon:

The Motion of Appellant Ballard for a Bill of Particulars as to Counts IV, V and VI Was Properly Denied.

Appellee has no quarrel with the general principle of law that an indictment should advise a defendant with sufficient particularity to enable him to prepare his defense and to safeguard him from further prosecution for the same act. (See general discussion this topic under heading relative to the substantive counts of the indictment under which appellants Duke and Ballard were charged). However, appellee does take the position that appellant Ballard has utterly failed to show by the facts of this particular case exactly how the government has failed in its burden so as to entitle him to his requested Bill of Particulars.

Generally, speaking a motion for a bill of particulars is addressed to the sound discretion of the trial court, and the exercise of that discretion denying the bill will not be disturbed on appeal unless it has been abused.

Wong Tai v. United States, 273 U. S. 77;

Kobey v. United States (1953, 9th Cir.), 208 F. 2d 583.

It is held that the proper function of a bill of particulars is two-fold, to state facts beyond those alleged in the indictment or information (1) so that the offense involved is sufficiently identified to enable the defendant to plead a conviction or acquittal thereon in bar of a possible second prosecution for the same offense; and (2) so that the defendant is sufficiently advised of the charge to enable him to prepare his defense and not to be surprised at the trial.

Tinkoff v. United States (1936, 7th Cir.), 86 F. 2d 868, cert. den. 301 U. S. 689, reh. den. 301 U. S. 715;

Remmer v. United States, 205 F. 2d 277 (judgment vacated and remanded on other grounds 347 U. S. 227, reaffirmed 222 F. 2d 720 (9th Cir., 1955)).

An examination of appellant Ballard's Petition for a Bill of Particulars and the Points and Authorities in Support Thereof [Clk. Tr. 18-25] reveals that the principal grounds relied on for the bill of particulars are those hereinbefore discussed, namely, that for various reasons the indictment did not charge any offense. Specifically objections were raised on such grounds that it was not clear who was actually to smuggle or clandestinely introduce into the United States the merchandise or, in what manner defendant participated in the conspiracy, or participated in the receiving, or selling and facilitating the transportation and concealment of the merchandise after

illegal transportation, or who did various physical acts alleged in the overt acts of Count IV of the indictment, etc. Such an attempted use flies in the face of the rule that it is not the function of a bill of particulars to force a disclosure of the government's evidence in advance of trial.

United States v. Kushner (1943, 2nd Cir.), 135 F. 2d 668, cert. den. 320 U. S. 212.

The purpose of a bill of particulars is to define more specifically the offense charged. It is not for the purpose of disclosing in detail the evidence upon which the government expects to rely.

Fischer v. United States (1954, 10th Cir.), 212 F. 2d 441, 445.

Particularly pertinent is the language in *Nye & Nissen v. United States*, 168 F. 2d 846, 851 (9th Cir., 1948), affirmed 336 U. S. 613, viz:

"The information requested . . . appears to concern only the details of the evidence which was to be relied upon by the government in support of its charges; the times, places and persons involved in various evidentiary transactions, etc.

". . . although it may be true that defendants could not have known in advance of trial what various facts and circumstances were to be relied upon by the government as proof of the alleged conspiracy, this does not necessarily indicate they were prejudiced by the denial of the motion. The government should not be compelled by a bill of particulars to make a 'complete discovery' of its entire case."

Accordingly, the government is not required to lay before appellant its entire case in all its details and ramifications.

American Tobacco Co. v. United States (1944, 6th Cir.), 147 F. 2d 93, 117, affirmed 328 U. S. 731 (1946).

Manifestly, the real purpose of appellant Ballard's Motion for a Bill of Particulars was to have furnished to him a summary of the evidence upon which the government proposed to rely to sustain the averments of the indictment. This is not the proper function of a bill of particulars and has been held not to be "cause" under Rule 7(f).

United States v. Blumberg, 136 F. Supp. 275, 276;
United States v. Bryson, 16 F. R. D. 477, 479.

It is submitted by appellee that appellant Ballard's request for a Bill of Particulars was properly refused under the well-known rule that a bill of particulars which constitutes a fishing expedition into the government's case will be refused.

Maxfield v. United States (9th Cir., 1945), 152 F. 2d 593;

United States v. Kushner (1943, 2nd Cir.), 135 F. 2d 668.

It is submitted that the indictment is sufficiently clear to fulfill all the requisites of a valid indictment. Additionally, prior to trial Ballard was served with a factual summary. No objection was made by him to the sufficiency of this summary. Accordingly, it is further submitted that the Court committed no error in denying appellant Ballard's Petition for a Bill of Particulars.

**Appellant Ballard Was Not Entitled to a Severance From
His Codefendants and His Motion for Separate Trial
Was Properly Denied.**

Appellant Ballard moved prior to trial for a severance from his fellow defendants and a separate trial. It is from a denial of his motions that this ground of appeal arises. Ballard contends that he was prejudiced by the introduction of evidence by the government relative to Counts in which he was not charged. Since he was only charged in three out of ten counts he submits that to try him with his codefendants Duke and Buono was to submit him to the evils inherent in a mass trial. It is his position that had he been separately tried he would have been acquitted. As an example of the prejudice resultant from his consolidated trial, appellant Ballard quotes the colloquy between Court and counsel (heretofore quoted *supra*) at the time that the Court endeavored to clarify the various theories of defense employed by the respective defendants [Tr. 3213, 3214]. It is urged that this discussion seemed like an argument to Ballard to the prejudice of Ballard. Ballard reads prejudicial significance into the remark of the Court that "I suppose also that includes the defense, so far as the conspiracy is concerned, because conspiracy was over a considerable period of time when Ballard was present, at least within the area in which the conspiracy supposedly operated." [Tr. 3214]. Inasmuch as Ballard was charged with conspiracy in Count IV of the indictment it is submitted that it would be only normal for the Court to make the above quoted statement. Furthermore, it is alleged, although in no way explained, that for Ballard to explain or clarify his defensive theory to the Court in some way denied his constitutional rights in violation of the Fifth Amendment to the United States Constitution. Further significance is attributed to the fact that while Duke, Ballard and Buono were all charged on Counts IV, V, and VI, appellant Buono was acquitted as to those counts while

appellants Duke and Ballard were convicted. Ballard evidently takes issue with the verdict of the jury in this regard and indicates that it is a manifestation of the prejudice redounding to Ballard by reason of his being required to go to trial with his codefendants. It is submitted that appellant Ballard in no way shows any abuse of the traditional discretion vested in Federal Judges to decide whether or not to grant motions for separate trials. The exercise of this discretion is as free and unfettered in conspiracy cases as in any other type of action. This principle is firmly established in this Circuit. In *Olmstead v. United States* (1927, 9th Cir.), 19 F. 2d 842, this Honorable Court stated at page 847:

“In conspiracy cases the rule in the federal courts is that severance is permissible, and that the courts are vested with judicial discretion to order it, but that the exercise of that discretion is not subject to review except for abuse. *United States v. Ball*, 163 U. S. 662, 16 S. Ct. 1192, 41 L. Ed. 400; *Heike v. United States*, 227 U. S. 131, 33 S. Ct. 226, 57 L. Ed. 450, Ann. Cas. 1914 c. 128; *Scheib v. United States* (C. C. A.), 14 F. 2d 75. We are not convinced that there was abuse of discretion in denying the application. It appears that upon the trial the defendant Finch testified in his own behalf, and it does not affirmatively appear that his defense was in any way hampered by his inability to adduce testimony from others.”

Likewise the rule was recently restated by the Supreme Court in the celebrated case of *Opper v. United States* (1954), 348 U. S. 84, wherein the Court stated at page 94:

“Petitioner’s final complaint arises out of the fact that the conspirators were tried jointly. The petitioner feels that the jury might have become con-

fused and improperly considered statements of co-defendant Hollifield in reaching its verdict as to petitioner. Other than this general possibility of confusion, he points out nothing specifically prejudicial resulting from the joint trial. The fact that the Court of Appeals below reversed on two counts because of lack of evidence independent of statements of Hollifield is emphasized to bolster this claim of error as to the remaining counts.

"It was within the sound discretion of the trial judge as to whether the defendants should be tried together or severally and there is nothing in the record to indicate an abuse of such discretion when petitioner's motion for severance was overruled. The trial judge here made clear and repeated admonitions to the jury at appropriate times that Hollifield's incriminatory statements was not to be considered in establishing the guilt of the petitioner. To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions. There is nothing in this record to call for reversal because of any confusion or injustice arising from a joint trial. The record contains substantial competent evidence upon which the jury could find petitioner guilty."

As in the *Opfer* case the Court below clearly charged the jury that they should consider guilt on an individual rather than mass basis. Thus, the Court stated [Tr. 5093]:

"Mr. Ballard has raised some objection to having to stand trial here with the other two, because Mr. Ballard is named in only three counts. Of course, as to each defendant you will give that defendant the benefit of special, particular consideration of that defendant, as to the counts in which he is charged."

It is submitted by the appellee that the foregoing authorities conclusively support the action of the Court below in denying appellant Ballard a separate trial.

The Court Did Not Err in Giving Its Instructions Relative to Appellant Ballard's Alibi.

Appellant Ballard next contends that he was prejudiced by the following instruction of the Court [Tr. 5094]:

"The defendant Ballard has also offered some evidence of what we know in law as an alibi. An alibi is a circumstance of a person not being present at the time that an offense was committed. You should scrutinize the testimony of the persons who told you that Mr. Ballard was in Santa Barbara at the time that certain prosecution witnesses said that he was at some other place. Analyze it. And, of course, the burden is always upon the government to show that the defendant is present at the place where he was supposedly committing the offense."

It is admitted by appellant Ballard that the foregoing instruction may have been "toned down" by jury instruction 17 subsequently given at the instance of Ballard's counsel. This curative instruction provided [Tr. 5113]:

"You are instructed that there has been introduced on behalf of the defendant Louis Glenn Ballard, evidence that on May 13, 1953, he was not at Desert Center, California, at a time, as is contended by witnesses for the government, but that he was at Santa Barbara, California, that it was therefore physically impossible for him to have been at Desert Center, California, and to have committed the acts charged by the witnesses for the government. This defense is what is known in law as an 'alibi'. This testimony has bearing on Counts IV, V and VI of the indictment. If from this evidence on the question of alibi you entertain a reasonable doubt as to the guilt of

defendant, Louis Glenn Ballard, it would be your duty to return a verdict of not guilty as to defendant Ballard as to Counts IV, V and VI of the indictment.

“You are to bear in mind that it is not required that the alibi of defendant, Louis Glenn Ballard, be established beyond reasonable doubt or even by a preponderance of the evidence, it is sufficient of the evidence of alibi raises in your mind a reasonable doubt as to the guilt of the defendant Ballard, and if it does, you should find the defendant Ballard, ‘not guilty’.”

While conceding the partrial curative effect of the foregoing Instruction 17, appellant Ballard asks the question (Ballard Br. 32), “But can it be said when the jurors heard the instruction of the Court stating that the jurors should scrutinize the testimony, they did not reach the conclusion that these alibi witnesses were unreliable.” This contention can best be answered by a reiteration of the language of the Supreme Court in *Opfer v. United States* (1954), 348 U. S. 84, 95 (*supra*):

“To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. *Our theory of trial relies upon the ability of a jury to follow instructions.*” (Emphasis added.)

In addition, at the time the Court gave the above quoted Jury Instruction 17, appellant Ballard’s attorney conceded that such instruction if given would “correct the existing hiatus” [Tr. 5113].

The Court Did Not Err in Permitting Competent Government Evidence to Be Introduced Against Defendant Ballard by Way of Rebuttal.

Appellant Ballard lastly alleges that certain evidence was wrongfully admitted by the Court in rebuttal in that said evidence failed to rebut any element of Ballard's case. The particular evidence is discussed at some small length on pages 33, 34 and 35 of Ballard's Brief, however, a detailed discussion of the evidence is not essential at this point because as appellant Ballard concedes "the testimony of Miller, Springman, Crump and Giger would have been admissible in the government's case in chief, but actually rebutted no evidence offered in Ballard's defense." It is thus contended by Ballard that the Court by admitting the complained of evidence in the government's rebuttal prejudiced appellant. There is no showing in what way appellant Ballard was allegedly prejudiced. The short answer to this contention is that in the Federal Courts it is within the discretion of the trial court to allow evidence in rebuttal which might have been offered in chief.

Stone v. Chicago, Milwaukee, St. Paul & Pacific R. R. Co., 53 F. 2d 813;

Erie R. R. Co. v. Kennedy, 191 Fed. 332;

Wilmoth v. Hamilton, 127 Fed. 48;

Casey v. Seas Shipping Co. (2nd Cir.), 178 F. 2d 360.

Vic Buono.

In addition to his joint participation in raising the question heretofore discussed concerning the validity of the indictment to charge a violation of 18 U. S. C. A., Sec. 545 (*supra*), appellant Buono raises only one additional error.

Appellant Buono Was Properly Convicted of the Conspiracy Charged in Count VII of the Indictment.

Appellant Buono makes the argument that his conviction on Count VII of the indictment must be reversed inasmuch as, its alleged, the purposes and time of the conspiracy therein contained, are identical with the purposes of the conspiracy alleged in Count IV, of which he was acquitted. It is Buono's contention that the facts alleged and evidence adduced establish but one conspiracy and that Count VII which alleged a conspiracy on which Buono was convicted was in fact merely a part of the conspiracy alleged in Count IV of which Buono was acquitted. There follows at pages 14 through 16 of Buono's Brief, an able discussion on the theory of multiple conspiracies. Many cases are cited in support of appellant Buono's contention that there is one rather than several conspiracies present in the instant case. A review of these cases reveals, however, that in each case the existence of one or many conspiracies, was dependent upon the facts in each respective case as shown by the evidence. Thus, in *Kotteakos v. United States*, 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557, the Supreme Court held that the evidence showed not the single conspiracy charged in the indictment but rather a group of independent conspiracies tangential to each other only in that they revolve around a central figure. In both *Bridgeman v. United States* (9th Cir.), 183 F. 2d 750, and *United States v. Witt* (2nd Cir.), 215 F. 2d 580, it was decided on the basis of the facts of the case that the evidence showed not one but several conspiracies. Thus,

the United States contends that the question of the number of conspiracies here present must be determined solely with reference to the evidence. In this connection it is so well-established as to need no citation that in determining an evidentiary question on appeal, the evidence must be interpreted in favor of the appellee and all presumptions and inferences which may be drawn from the evidence must be drawn in his favor.

Turning to the evidence, it is the contention of the appellee that the proof clearly establishes the existence of three separate and individual conspiracies. This is true even though they had during certain periods common members, operated at the same time and in some instances had similar objectives.

Counts I, IV and VII are the conspiracy counts in the indictment. Count I charges the so-called smuggling conspiracy (*supra*) and names as conspirators appellant Duke, Fred Steiner, Nicholas Spicuzza, Olive Spicuzza, John W. Hadzima, Chester W. Walzberg, Charles Walker, George Todd, Roy Pursselley, George Monolias, Samuel Segovia, Donald F. Hamm, Edward V. Ling, and Robert Helm. The time covered by this conspiracy was from January 1953 until April 1953, and the place of operation was San Diego and Imperial Counties, California. In discussing the evidence on these counts reference is made to the extended discussion of the evidence contained heretofore in Statement of the Case (*supra*). For purposes of this discussion suffice to say that the evidence taken in the light most favorable to the government showed that certain of the unindicted conspirators were engaged in the smuggling of psittacine birds; that appellant Duke became the attorney for these persons; that Duke introduced to these smugglers, Robert Helm, an aviator who was likewise a client of Duke's; that as a result of this introduction a conspiracy was formed to bring psittacine birds into the United States from Mexico by means of an airplane and

that pursuant to this illegal agreement certain numbers of psittacine birds were smuggled into the United States and the profits split up among the co-conspirators. Thus this count (I) is supported by evidence showing a general smuggling conspiracy over the period of January through April of 1953.

Count IV is one with which appellant Buono is concerned. This count charges the so-called hi-jack conspiracy. It commences in April 1953 immediately following the cessation of the general smuggling conspiracy charged in Count I. The locale of the conspiracy in San Diego, Riverside, and Imperial Counties, California. Different parties were engaged as conspirators here, namely, appellants Duke, Ballard, Buono, along with John W. Hadzima, Phyllis Hadzima, Mary Ascani, Roy Purselley, and Robert Helm. It will be noted that conspicuously absent from this conspiracy were Fred W. Steiner, Nicholas Spicuzza, Olive Spicuzza, Chester Vossberg, Charles Walker, George Todd, George Monolias, Samuel Segovia, Donald Hamm, and Edward Ling, all of whom were co-conspirators in the general smuggling conspiracy charged in Count I. The evidence adduced showed that during the month of April 1953, appellants Buono and Duke conferred with Hadzima and Helm and as a result of such conference an illegal agreement was formed whereby Helm would pretend to cooperate with Spicuzza and Todd who were apparently still engaged in the smuggling of psittacine birds. Helm was to fly birds for Spicuzza and Todd from Mexico into the United States. He was, however, to notify appellant Duke of the proposed schedules and landing places. On May 13, 1953, Helm notified Duke that Spicuzza and Todd were to receive a load of birds from Helm at Desert Center, California. Pursuant to this information, Duke directed co-conspirators Purselley, Ballard and Hadzima to go to the place of landing and steal or "hi-jack" the birds. This plan was carried out at

gun point and the birds when taken from Spicuzza were transported to the aviary of Mary Ascani in Burbank, California, by appellant Ballard and conspirators Pursseley and Hadzima. As a result of this successful hi-jack sums of money were given to appellant Duke and appellant Buono respectively. As to Count IV, it can be seen that the evidence establishes an independent conspiracy covering a different time and having different members and being directed to a different purpose than was the conspiracy charged in Count I.

Count VII charged a conspiracy commencing in June of 1953 and continuing until October 1953. As is pointed out by appellant Buono, the period involved in Count VII falls entirely within the period contained in Count IV. However, the locale is different, the alleged conspiracy taking place in San Diego, Imperial, and Los Angeles Counties, the personnel is different comprised in this case of appellants Duke and Buono and Helm, Spicuzza, Todd and one Albert W. Appel. The evidence showed that due to the hi-jacking the fortunes of Todd and Spicuzza in the smuggling business were at a low ebb; that appellants wishing to keep the others in business so that they might hi-jack them further in the future, agreed with Spicuzza and Todd to see to it that further hi-jacking was stopped. In addition, in order that Helm might continue to bring in the birds it was necessary that he have a new airplane and the acquisition of this airplane was vital for this conspiracy. Accordingly, appellants Buono and Duke met with Spicuzza, Todd and Helm and as a result of that meeting appellant Buono secured certain monies from Albert W. Appel and with these monies, Helm purchased an airplane with which to fly in merchandise from Mexico; and that once getting the plane Helm did so fly in various and sundry psittacine birds from Mexico into the United States. It is submitted that even though the period occupied by the conspiracy charged in Count VII fell within

the period of the conspiracy charged in Count IV not only were the purposes of the participants different but the objects of the conspiracies were at cross purposes. It is, therefore, submitted on the authority of *Kotteakos v. United States*, 328 U. S. 750, 90 L. Ed. 1557, 66 S. Ct. 1239, that the evidence here shows separate conspiracies rather than one large single one. Accordingly, it is submitted that acquittal of Buono on the conspiracy charged in Count IV did not merely by reason of the fact that Count IV covered a greater period within which existed the conspiracy charged in Count VII, acquit appellant Buono of the charges under the other conspiracy count. There is no error present in this regard.

Conclusion.

The various grounds urged by the three appellants for reversal have been extensively treated in the body of this opinion. It would be belaboring an already overly long brief to attempt to restate them even in capsule form at this point. Suffice to say that it is the position of the appellee that the grounds taken are without merit and should be denied. However, as is apparent from the record this was a long and tedious trial. It was beset with many collateral issues and it would not be surprising if somewhere in the record some error may be found. However, a reading of the record leaves one with the firm conviction that the guilt of these three appellants is firmly and conclusively established. In this regard it is axiomatic that error may be disregarded in the face of overwhelming evidence of guilt.

Ippolito v. United States (1946, 6th Cir.), 108 F. 2d 668;

United States v. Tramaglino (1952, 2nd Cir.), 197 F. 2d 928;

Lutwak v. United States (1953), 344 U. S. 604;

Morgan v. United States (1938), 98 F. 2d 473;

Landay v. United States (1939, 6th Cir.), 108 F. 2d 698, cert. den. 60 S. Ct. 721, 309 U. S. 681, 84 L. Ed. 1024;

Burstein v. United States (9th Cir.), 178 F. 2d 665;

Bennett v. United States (1956, 9th Cir.), June 15, 1956, No. 14,551;

Robbins v. United States (1916, 9th Cir.), 229 Fed. 987;

Simmons v. United States (1941, 9th Cir.), 119 F. 2d 539, cert. den. 62 S. Ct. 78, 314 U. S. 616, 86 L. Ed. 496.

In view of the premises, it is respectfully submitted that the judgments of conviction below must be affirmed on all counts as to all defendants.

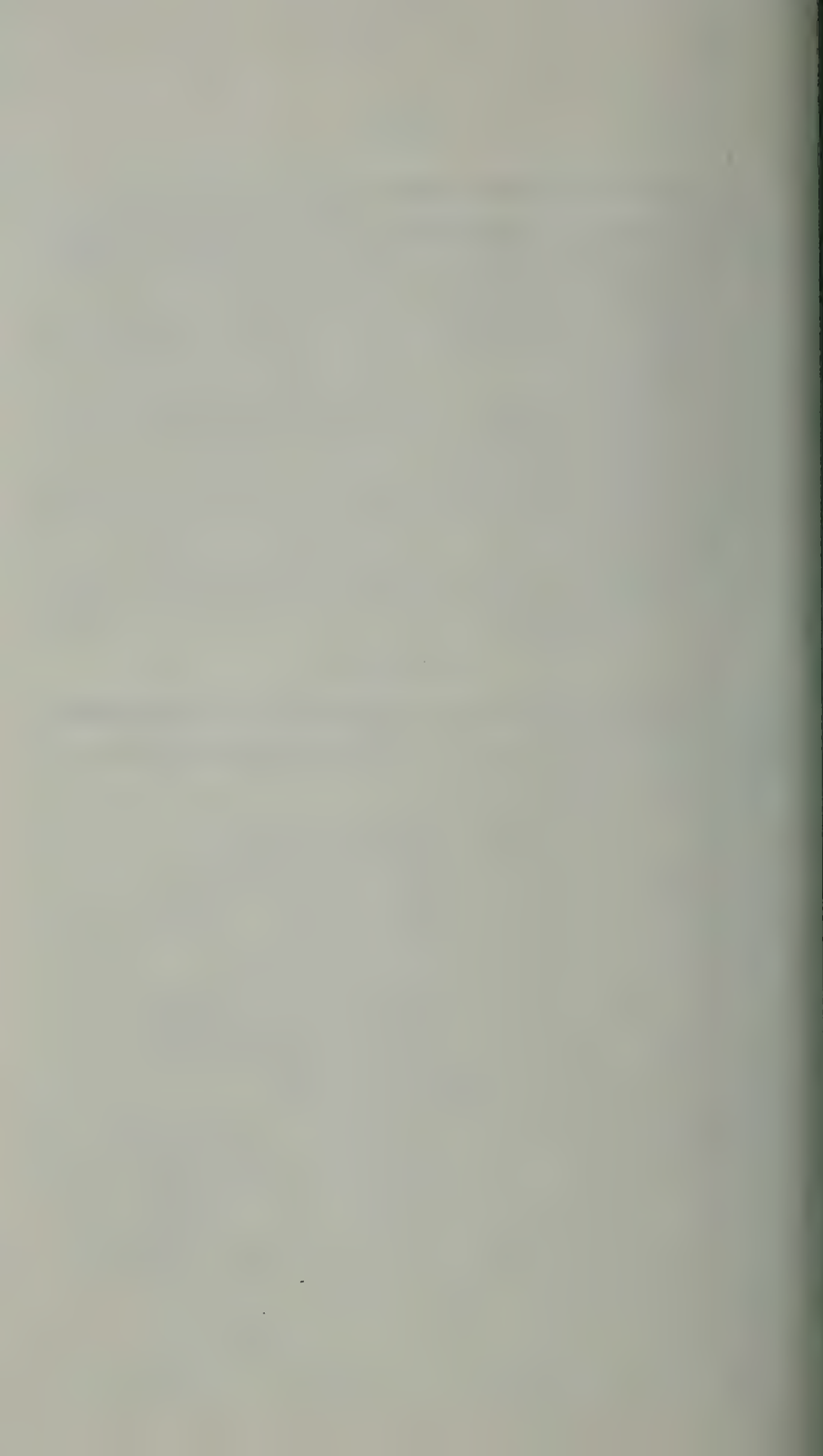
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No. 15146.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLIFFORD L. DUKE, JR., LOUIS GLEN BALLARD, and VIC
BUONO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Southern Division.

OPENING BRIEF ON BEHALF OF APPELLANT, VIC BUONO.

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FILE

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PAUL P. O'BRIEN, C

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IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

CLIFFORD L. DUKE, JR., LOUIS GLEN BALLARD, and VIC
BUONO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

**OPENING BRIEF ON BEHALF OF
APPELLANT, VIC BUONO.**

Jurisdictional Statement.

The criminal prosecution in the case at bar was instituted on an indictment containing ten counts. In counts V, VI, VIII, IX and X of the indictment appellant Vic Buono is charged with violations in the Southern District of California of United States Code, Title 18, Section 545, smuggling goods into the United States. Counts IV and VII purport to charge appellant Buono with two conspiracies in violation of United States Code, Title 18, Section 371. The District Court, therefore, had original jurisdiction under the provisions of United States Code, Title 18, Section 3231.

Appellant Buono was convicted on counts VII, VIII, IX and X and acquitted on counts IV, V and VI. Jurisdiction to review the judgment of conviction is conferred upon this Honorable Court by United States Code, Title 28, Section 1291.

Statement of the Case.

Appellants were charged in an indictment containing 10 counts. Only counts IV to X, inclusive, relate to appellant Buono. [Tr. of R. pp. 2-13.] Count IV charged in substance that from April, 1953, to December, 1954, in the Southern District of California, appellants Buono, Duke, and Ballard, together with John W. Hadzima, Phyllis Hadzima, Mary Ascani, Roy Purselli, Robert Helm and others conspired to commit offenses against the United States, namely, violations of 18 U. S. C. A., Section 545, by knowingly and willfully, with intent to defraud the United States, smuggling and clandestinely introducing into the United States merchandise, namely, psittacine birds, which should have been invoiced; by fraudulently and knowingly importing merchandise, namely, psittacine birds, into the United States contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof; and by knowingly receiving, concealing and facilitating the transportation and concealment of such merchandise after importation, knowing the same to have been imported contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof. Count IV further alleged seven overt acts in furtherance of the conspiracy. [Tr. of R. pp. 6-8.]

Count VII charged, in terms substantially identical with Count IV, that from about June 1, 1953, to about October 31, 1953, appellants Duke and Buono conspired with Robert Helm, Nicholas Spicuzza, George Todd, Albert W. Appel, and others to commit the same offenses against

the United States in the same manner as charged in Count IV. Count VII also alleged six overt acts in furtherance of the conspiracy. [Tr. of R. pp. 9-12.]

Count V charged in substance that on or about May 13, 1953, appellants Duke, Ballard and Buono knowingly and willfully, with intent to defraud the United States, smuggled and clandestinely introduced into the United States merchandise, namely, psittacine birds, which merchandise should have been invoiced, and that they imported said merchandise into the United States in violation of United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof. This count purported thereby to charge a violation of United States Code, Title 18, Section 545. [Tr. of R. p. 8.]

Counts VIII, IX and X were similar to Count V, except that only appellants Duke and Buono were charged, and the dates mentioned were, respectively, June 15, 1953, August 28, 1953, and September 28, 1953. [Tr. of R. pp. 12-13.]

Count VI charged that on or about May 13, 1953, appellants Duke, Ballard and Buono knowingly received, concealed and facilitated the transportation and concealment of certain merchandise, namely, psittacine birds, knowing the same to have been imported into the United States contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof. Count VI likewise purported to charge a violation of United States Code, Title 18, Section 545. [Tr. of R. p. 9.]

Appellant Buono first moved to dismiss the indictment and subsequently entered pleas of not guilty as to all counts in which he was charged. [Tr. of R. pp. 33-34.] The grounds for the motion to dismiss the indictment were stated therein, as follows [Tr. of R. pp. 38-39]:

“1. None of the Counts Four to Ten, inclusive, state facts sufficient to constitute a cause of action.

“2. Counts Four to Ten, inclusive, purport to charge a violation of a specific statute or a conspiracy to violate said statute, to-wit, Section 545, Title 18, United States Code. The facts alleged in Counts Four to Ten, inclusive, show that if any offense against the United States was in fact committed, the offense would be a violation of Sections 264 and 271 of Title 42, United States Code, a misdemeanor instead of a violation of Section 545 of Title 18, United States Code, which offense is designated a felony. (None of Counts Four to Ten, inclusive, of the Indictment state a public offense against the United States.)

“3. Count Seven of the Indictment should be dismissed since Count Four alleges a continuing conspiracy and Counts Four and Seven are identical in language, except that Count Seven does not name LOUIS GLEN BALLARD as a defendant, and the time of the conspiracy alleged in Count Seven falls within the time alleged in Count Four. One conspiracy cannot be split up into several conspiracies and the addition or withdrawal of a member does not constitute a new conspiracy.”

Appellant Buono's motion to dismiss the indictment was denied, and the case was set for trial. [Tr. of R. p. 68.]

The trial was lengthy. The reporter's transcript of the proceedings approaches six thousand pages in length. Appellant Buono has briefly summarized the evidence in his Statement of Evidence in Narrative Form. That statement appears to be adequate for a consideration of the questions presented on this appeal. The evidence, as stated therein, was as follows [Tr. of R. pp. 367-370]:

“Early in the year 1953, John Hadzima, Nicholas Spicuzza, George Todd and others were, and for a considerable time prior thereto had been, engaged together in the business of smuggling psittacine birds into the United States of America. In the latter part of February, 1953, Clifford L. Duke, Jr., an attorney at law, and Robert Helm, an aviator, joined this smuggling group in the illegal importation of psittacine birds. Duke acted as attorney for the conspirators, and, according to the testimony of the Government witnesses, advised them concerning their smuggling activities, and induced Robert Helm to enter the conspiracy and smuggle psittacine birds from Mexico into the United States by airplane.

“After Duke and Helm had entered the conspiracy, dissention arose between John Hadzima and Nicholas Spicuzza over the handling of the smuggling business; each one accusing the other of stealing psittacine birds which were to be or had been brought from Mexico to the United States. Thereafter, John Hadzima and Nicholas Spicuzza agreed to and did operate independently of each other in the smuggling of psittacine birds, but, according to their testimony, Duke and Helm continued to act in concert with both of them.

“After the split between Hadzima and Spicuzza, many loads of psittacine birds were smuggled into

the United States by Helm and other confederates of Hadzima and/or Spicuzza, and some of these loads, which Spicuzza and his confederates had been instrumental in obtaining and illegally importing into the United States, were "hijacked" and stolen by Hadzima and some of his confederates. According to the testimony, these birds were flown into the United States in airplanes (*sic*) piloted by Helm, who delivered them at times and places where they were to be stolen by Hadzima. At all times, Duke and Helm were in contact with Hadzima and undertook to keep him advised of the time and place the smuggled psittacine birds were to be delivered in the United States, with the intention that, immediately after their delivery in the United States by Helm, who was paid by Spicuzza to smuggle them from Mexico, they should be stolen by Hadzima.

"It further appears from the evidence that all of the *spittacine* (*sic*) birds which were involved in this prosecution were delivered to one or another of the conspirators by a Mr. Laimon, who operated a bird store in Mexico City, and that Mary Ascani, an unindicted co-conspirator and witness at the trial, who operated a pet shop in Burbank, California, bought and-or marketed the smuggled psittacine birds, irrespective of which of the conspirators delivered them to her after their illegal importation.

"The evidence offered to connect the defendant Victor F. Buono with the smuggling activities (*sic*) of the indicted and unindicted conspirators was to the effect that, at all times mentioned in the indictment, he was a licensed bail bond agent; that he furnished bail bonds for most of the conspirators who were arrested; that meetings of the conspirators were held at his office, from time to time, beginning in March, 1953 and continuing to October, 1953; that

he was present at these meetings and discussed various phases of the smuggling activities of Spicuzza, Todd, Hadzima and others, both before and after their indictment for smuggling, and knew that they were all engaged in smuggling psittacine birds; that, in June, 1953, he loaned \$2,500.00 to Helm for a down payment on an airplane which he knew or should have known was to be and which was, afterwards, used by Helm in smuggling psittacine birds into the United States; that he loaned various sums of money to Spicuzza after he knew that Spicuzza had been indicted for conspiracy to smuggle psittacine birds; that Spicuzza used this money to defray expenses incurred in the smuggling of psittacine birds; and that Buono was not to receive, and did not receive, any portion of the profits derived from the smuggling operations of Todd, Spicuzza or Helm, and was not paid any interest on the money loaned to them, but was repaid his advances.

“As to Counts VIII, IX and X of the Indictment, it was stipulated at the trial that the only theory on which the defendant Buono could be convicted was that he had conspired to smuggle psittacine birds into the United States.”

At the conclusion of the Government's case, appellant Buono moved for a judgment of acquittal as to him on counts IV through X, inclusive. [Tr. of R. pp. 149-150.] As an alternative it was moved that Count VII be included with Count IV. [Rep. Tr. of Proceedings, Vol. 13, p. 1901.] The motions were made on the same grounds as appellant Buono's motion to dismiss the indictment. [Rep. Tr. of Proceedings, Vol. 13, p. 1898 *et seq.*] They were denied. [Tr. of R. p. 150.] At the

conclusion of all the evidence, appellant Buono renewed his motion for judgment of acquittal. [Tr. of R. p. 223.] The Court denied the motion after the jury had returned its verdict. [Tr. of R. p. 246.]

Appellants Duke and Ballard were found guilty on all counts in which they were charged. [Tr. of R. pp. 248-260.] Appellant Buono was found not guilty on counts IV, V and VI, and guilty on counts VII, VIII, IX and X. [Tr. of R. pp. 261-267.]

Appellant Buono moved for a new trial as to counts VII, VIII, IX and X of the indictment on the ground, *inter alia*, that the Court erred in denying his motions for acquittal made at the conclusion of the Government's case and after all parties had rested. [Tr. of R. p. 288.] The motion was denied. [Tr. of R. p. 295.]

The Court pronounced its judgment of conviction of appellant Buono on counts VII, VIII, IX and X. He was sentenced to serve two years in the custody of the Attorney General on each count, the sentences to run concurrently, and to pay fines of \$3,000.00 on count VIII, \$1,000.00 on count IX, and \$1,000.00 on count X. Execution of the prison sentence was suspended and appellant Buono was placed on probation for a period of three years. The fine on count VIII was made payable in such installments as the probation officer may direct. Execution of the judgment as to the fines on counts IX and X was stayed for ninety and one hundred and twenty days, respectively. Tr. of R. pp. 308-310.]

Appellant Buono filed timely notice of appeal from the judgment and from the order denying his motion for a new trial. [Tr. of R. pp. 315-317.]

Two basic questions are raised by appellant Buono on this appeal. They are:

1. Could appellant Buono lawfully be indicted for or convicted of violations of United States Code, Title 18, Section 545, or of conspiracy to violate said section, on allegations and evidence showing that the objects the importation of which was involved were psittacine birds, in view of United States Code of Federal Regulations, Title 42, Section 71.152, which governs the importation of such birds and violation of which is made a misdemeanor by United States Code, Title 42, Section 271?

2. Could appellant Buono lawfully be indicted for or convicted of the conspiracy purportedly charged in count VII of the indictment in view of the failure of the Government to allege or prove facts which would support a conclusion that such purported conspiracy, of which appellant Buono was convicted and upon which his conviction of the substantive offenses was based, had any existence separate from the conspiracy charged in count IV and of which he was acquitted?

Both of the foregoing questions were raised on appellant Buono's motion to dismiss the indictment, his motion for acquittal made at the conclusion of the Government's case, his motion for acquittal after all parties had rested, and his motion for a new trial. It was and is appellant Buono's contention that each of these questions must be answered in the negative. Appellant Buono further contends that the trial court's erroneous determination as to each of them was prejudicial and that error as to either of them requires a reversal.

Specification of Errors Relied Upon.

1. The trial Court erred in denying appellant Buono's motion to dismiss the indictment. [Tr. of R. pp. 33-34, 38-39, 68.]

2. The trial Court erred in denying appellant Buono's motion for acquittal made at the conclusion of the Government's case. [Tr. of R. pp. 149-150.]

3. The trial Court erred in denying appellant Buono's motion for acquittal made after all parties had rested. [Tr. of R. pp. 223, 246.]

4. The trial Court erred in denying appellant Buono's motion for a new trial. [Tr. of R. pp. 288, 295.]

ARGUMENT.

I.

Appellant Buono Could Not Lawfully Be Indicted for nor Convicted of Violations of United States Code, Title 18, Section 545, nor of Conspiracy to Violate Said Section, on Allegations and Evidence Showing That the Objects the Importation of Which Was Involved Were Psittacine Birds.

At all pertinent times United States Code, Title 18, Section 545, provided:

“Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced * * *; or

“Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

“Shall be fined not more than \$5,000 or imprisoned not more than two years, or both. * * *”

United States Code, Title 18, Section 371, provided:

“If two or more persons conspire * * * to commit any offense against the United States, * * * and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

“If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the punishment provided for such misdemeanor.”

At all pertinent times 42 Code of Federal Regulations, Section 71.152(b) provided:

“Psittacine birds shall not be brought into the United States for the purpose of sale or trade. Psittacine birds may be brought in only for the purposes and under the conditions prescribed in subparagraphs (1) to (4), inclusive, of this paragraph, and subject to the provisions of Section 71.153.”

The purposes for and the conditions under which such birds may be imported are not material to the case at bar. They were not complied with.

42 Code of Federal Regulations, Section 71.152(b) was promulgated by the Surgeon General under the authority vested in him by 42 United States Code Annotated, Section 264.

United States Code, Title 42, Section 271(a) provides:

“Any person who violates any regulation prescribed under sections 264-266 of this title * * * shall be punished by a fine of not more than \$1,000 or by imprisonment for not more than one year, or both.”

It is appellant Buono's contention that the allegations of the indictment and the evidence produced by the Government tended to show commission of offenses and conspiracy to commit offenses punishable as misdemeanors under 42 U. S. C. A., Sec. 271(a). Appellant further contends that either, (1) the adoption of the Surgeon General's regulation making 42 U. S. C. A., Sec. 271(a) applicable to the importation of psittacine birds removes the importation of such birds from the operation of the

provisions of 18 U. S. C. A., Sec. 545, or, (2) both statutes were applicable to the case at bar; that violation of neither could be proven without proving violation of the other, and that, in these circumstances, the prosecution must be for commission of and conspiracy to commit the offense carrying the lesser penalty.

In *Steiner, et al. v. United States*, 9 Cir. 1956, 229 F. 2d 745, this Honorable Court rejected contentions similar to the foregoing without stating its reasons for so doing. Since the decision by this Court of the *Steiner* case, the United States Supreme Court has decided *Berra v. United States*, U. S., 100 L. Ed. 563, S. Ct. In that case the Supreme Court refused to consider the effect of an overlapping of statutes proscribing misdemeanors and felonies, because the question was not properly raised below. Justices Black and Douglas, dissenting, took the position that the question had been adequately raised, and that in such a situation the Government has no election, but is bound to prosecute under the statute prescribing the lesser penalty. Appellant Buono respectfully submits that this Honorable Court should reconsider its decision in *Steiner v. United States, supra*, as to this point, in the light of the Supreme Court decision in the *Berra* case, *supra*, and should reverse the judgment in the case at bar, because the prosecution was improperly brought for violation of and conspiracy to violate 18 U. S. C. A., Sec. 545, rather than 42 U. S. C. A., Sec. 271(a).

II.

Appellant Buono Could Not Lawfully Be Indicted for nor Convicted of the Conspiracy Purportedly Charged in Count VII of the Indictment, in View of the Failure of the Government to Allege or Prove Facts Which Would Support a Conclusion That Such Purported Conspiracy Had Any Existence Separate From the Conspiracy Charged in Count IV.

The allegations of the indictment and the evidence relating to the question here discussed have been set forth in substance above. Appellant Buono was indicted on two conspiracy counts. The alleged purposes of the two conspiracies are identical. The alleged time of the count VII conspiracy, June-October, 1953, fell entirely within the period alleged for the count IV conspiracy, April, 1953-December, 1954. Three persons were named as conspirators in both counts, Clifford L. Duke, Jr., Vic Buono and Robert Helm. [Tr. of R. pp. 6-12.]

The evidence revealed additional identities in the allegedly separate conspiracies. In each the birds were to be, and were, obtained in Mexico from one Laimon. In each the birds were to be, and were, flown in by airplane, by Robert Helm. In each the birds after importation were to be, and were, disposed of in a similar manner. [Tr. of R. pp. 367, *et seq.*]

It is appellant Buono's contention that the facts alleged and the evidence adduced established that there was but one conspiracy. What was alleged to be a separate conspiracy under count VII was an inseparable part of the conspiracy alleged in count IV. All of the evidence adduced by the Government in support of count VII was admissible under the allegations of count IV. It is appel-

lant Buono's further contention that in order to state two conspiracy offenses in the same indictment the Government must allege facts the proof of which would establish separate conspiracies. In the case at bar count VII should, therefore, have been dismissed or consolidated with count IV because, on the face of the indictment, it appeared that it was part and parcel of count IV. Furthermore, since the Government's evidence showed that count VII was one with count IV, appellant Buono's motions for acquittal as to count VII and for a new trial as to counts VII, VIII, IX and X, should have been granted.

In answer to this the Government asserts that it has proven two conspiracies. The assertion that there were two conspiracies is based upon evidence that in connection with count VII a new airplane was obtained for Helm to use in flying in the birds, and that in connection with count IV there was an agreement, which was carried out, that after the birds were imported and all the federal offenses charged had been committed, some of the conspirators would hijack the birds from others who had brought the birds in pursuant to the conspiracy.

In support of its assertion that these facts establish two separate conspiracies, the Government relies upon *Kottekos v. United States*, 328 U. S. 750, 90 L. Ed. 1557, 66 S. Ct. 1239. In that case thirty-two persons were indicted for conspiring to obtain loans insured by the Federal Housing Administration upon false applications. On hearing in the Supreme Court the Government admitted that the evidence showed not one, but at least eight separate conspiracies. Although all the conspiracies had similar purposes, they had nothing in common, except that one Brown was a party to each and acted as broker in all of the loan transactions. According to the Court, the con-

spiracies were arranged like the spokes of a wheel, with Brown as the hub and without a rim. The Government contended that the variance was not prejudicial to the appellants, of whom Brown was not one. The Supreme Court found prejudice and reversed the convictions.

Appellant respectfully submits that the *Kotteakos* case does not support the Government's position. In the first place, as this Honorable Court had occasion to point out in *Bridgeman v. United States*, 183 F. 2d 750, the Government conceded in the *Kotteakos* case that the evidence showed several conspiracies, so that question was not presented or determined by the Supreme Court in that case. Furthermore, the conclusion that there were more than one conspiracy in the *Kotteakos* case depended upon the peculiar factual situation in that case. It would appear from subsequent decisions that the factual situation was practically unique.

The leading case on the applicability of *Kotteakos v. United States*, *supra*, appears to be *Blumenthal v. United States*, 332 U. S. 539, 92 L. Ed. 154, 68 S. Ct. 248, affirming a decision of this Honorable Court which appears at 158 F. 2d 883. In that case five persons were charged with conspiracy to sell whiskey at above ceiling prices. The evidence disclosed a scheme to dispose of 4,000 cases of whiskey at above ceiling prices in a manner which would make the sales appear legitimate. The Court stated, at page 556:

“And in a hypertechnical aspect the case as a whole might be regarded as showing in one phase an agreement among Goldsmith, Weiss and the unknown owner, X, and in the other an agreement among the five defendants to which X was not a party. Thus in the most meticulous sense it might be regarded as disclosing two agreements with Goldsmith and Weiss as figures common to both.”

However, the Supreme Court went on to hold that there was but one conspiracy, pointing out that all the conspirators had a common object, that they must have known that others were involved in such a large undertaking, and that it is unnecessary that each conspirator know all the others or all the details of the conspiracy.

In *Bridgeman v. United States*, 9 Cir., 183 F. 2d 750, defendants were charged with mail fraud under a statute, 18 U. S. C. Sec. 338, which proscribed using the mails to execute a scheme or artifice to defraud. The evidence showed that one Rhodes was a manufacturer of peanut vending machines, that appellants and others were, "distributors", of the machines, that Rhodes provided the, "distributors", with, "sales kits", containing misrepresentations and generally controlled the manner in which resales were made, and that the mails were used in carrying out the scheme. The case was tried on the theory that the evidence showed one scheme. Appellants contended that this evidence showed numerous separate schemes in the pattern of the *Kotteakos* case (*supra*). This Honorable Court held that there was but one scheme, citing *Blumenthal v. United States*, *supra*, and pointing out that each distributor knew that he was part of a larger plan, and that others were distributing the product in the same way he was.

In *United States v. Rosenberg, et al.*, 2 Cir., 195 F. 2d 583, Julius and Ethel Rosenberg, David Greenglass, Anatoli Yakolev, and Morton Sobell were charged with conspiring between 1944 and 1950 to communicate information to the U. S. S. R. in violation of 50 U. S. C., Section 32. Sobell contended, page 600, that the Government's evidence showed two conspiracies, one between Rosenberg and Sobell to send abroad certain fire control and military

engineering information, and another between Rosenberg, Greenglass and one Gold, with which Sobell was not connected, to ship atomic information from Los Alamos to the Soviet Union. The trial Court denied Sobell's motion to dismiss the indictment made at the conclusion of the Government's case and instructed the jury on the one conspiracy theory. The Court of Appeals stated that if this was error it was prejudicial. However, the Court held that there was no error, that the evidence showed one conspiracy to send all kinds of defense information abroad, relying on *Blumenthal v. United States, supra*, and distinguishing *Kotteakos v. United States, supra*.

In *United States v. Witt*, 2 Cir., 215 F. 2d 580, the indictment charged that from December, 1946, to August, 1952, former Internal Revenue agents O'Brien, Tanaker, Witt, Inkeles, and Rourke conspired together and with unindicted co-conspirators Zelnick and Miller to defraud the United States and to defraud the United States in its governmental function of administering the revenue laws free from corruption. The evidence showed the following: In July, 1946, agents Tanaker and Miller conspired to take and did receive from Spector a bribe for a favorable tax report. In 1947 Miller and Tanaker obtained \$5,000 from H & H to "clear up" a purported tax liability of well over \$10,000. In June, 1947, Tanaker left the Internal Revenue Department, and in August of that year O'Brien became head of the Department Office in Troy, New York. In late 1948 O'Brien, at Miller's behest, arranged to have the Acme Glove case assigned away from a, "tough agent", and Tanaker, Rourke and O'Brien shared a \$3,000 bribe for a favorable tax determination. In November, 1948, Miller arranged with Zelnick to take a \$1,000 bribe to "fix" the Oppenheimer case. In June, 1949, the Barlowe return was "fixed" by Miller, Inkeles

and O'Brien, as was the Bell return by Tanaker, Miller, O'Brien and Witt. It was only then that O'Brien and Miller met. Thereafter numerous other bribes were taken in various other cases. Various combinations of persons participated in different cases. All of the conspirators did not participate in any one, and the bribes were shared only by those who participated. It was contended on appeal, in reliance on *Kotteakos v. United States, supra*, that the evidence showed not one, but several conspiracies. The Court of Appeals held that the evidence supported a finding of a single, over-all, continuing conspiracy, and that the fact that particular "fixes", were carried out by particular conspirators, were not known to all the conspirators, and the bribes therefrom were not shared by all, is not inconsistent with that conclusion. In so holding the Court relied on *Blumenthal v. United States, supra*.

Other cases in which the courts have recognized the limitations on the applicability of the decision in *Kotteakos v. United States* and have concluded that the evidence showed one, rather than several, conspiracies are:

Kaufman v. United States (6 Cir.), 163 F. 2d 404;

Berenheim v. United States (10 Cir.), 164 F. 2d 679;

Thomas v. United States (5 Cir.), 168 F. 2d 707;

Calvaresi v. United States (10 Cir.), 216 F. 2d 891;

Ritter v. United States (10 Cir.), 230 F. 2d 324.

Appellant Buono respectfully submits that an application of the reasoning of the foregoing cases to the case at bar makes it obvious that the facts alleged and the evidence offered by the Government show only one conspiracy in the case at bar. Counts IV and VII allege the purpose

of the conspiracy in substantially identical terms. [Tr. of R. pp. 6-12.] The evidence showed that at all times there was one continuous common object, the smuggling of psittacine birds into the United States. [Tr. of R. pp. 367, *et seq.*] The period of the alleged count VII conspiracy fell entirely within that alleged for count IV. [Tr. of R. pp. 6-12.] Counts IV and VII name three conspirators common to both, Duke, Buono, and Helm. [Tr. of R. pp. 6-12.] The evidence, some of which the jury evidently did not believe as to Buono, not only implicated these three, but showed that most, if not all, of the others named in either count had been involved together in bird smuggling. [Tr. of R. pp. 367, *et seq.*] In the transactions relied upon to support both counts the birds were obtained from one Laimon in Mexico and flown into the United States by Helm. [Tr. of R. pp. 368, *et seq.*]

The foregoing facts make it clear that this case cannot be fitted into the rationale of the *Kotteakos* case. In that case the result depended on the fact that the sole connecting link between the various conspiracies was the common membership of Brown, a situation which is clearly not duplicated in this case. On the contrary, the case at bar appears to be most closely analogous to the *Witt* case, *supra*, in which there was a single continuous large conspiracy, within which various combinations of the participants carried out particular transactions, as the needs of the situation dictated.

Appellant, therefore, respectfully submits that the allegations and evidence in the case at bar established but one conspiracy, the allegations and proof under count VII being inseparable from those under count IV. Buono's motions to dismiss count VII, to acquit on it, or to include

it within count IV, should, therefore, have been granted. In view of the stipulation that Buono could only be convicted of counts VIII, IX and X on the conspiracy theory, the jury could not properly and undoubtedly would not have convicted him of these counts alone. Therefore, in view of the errors as to the only conspiracy count of which he has been convicted, the convictions on counts VIII, IX and X based thereon, cannot stand. The trial Court, therefore, erred in denying Buono's motion for a new trial as to all counts on which he was convicted.

The errors complained of were prejudicial since they deprived him of his most fundamental right, a trial on the proper issues, and since they resulted in a conviction, which, but for such errors, could not have occurred. The judgment of conviction of appellant Buono must, therefore, be reversed.

Respectfully submitted,

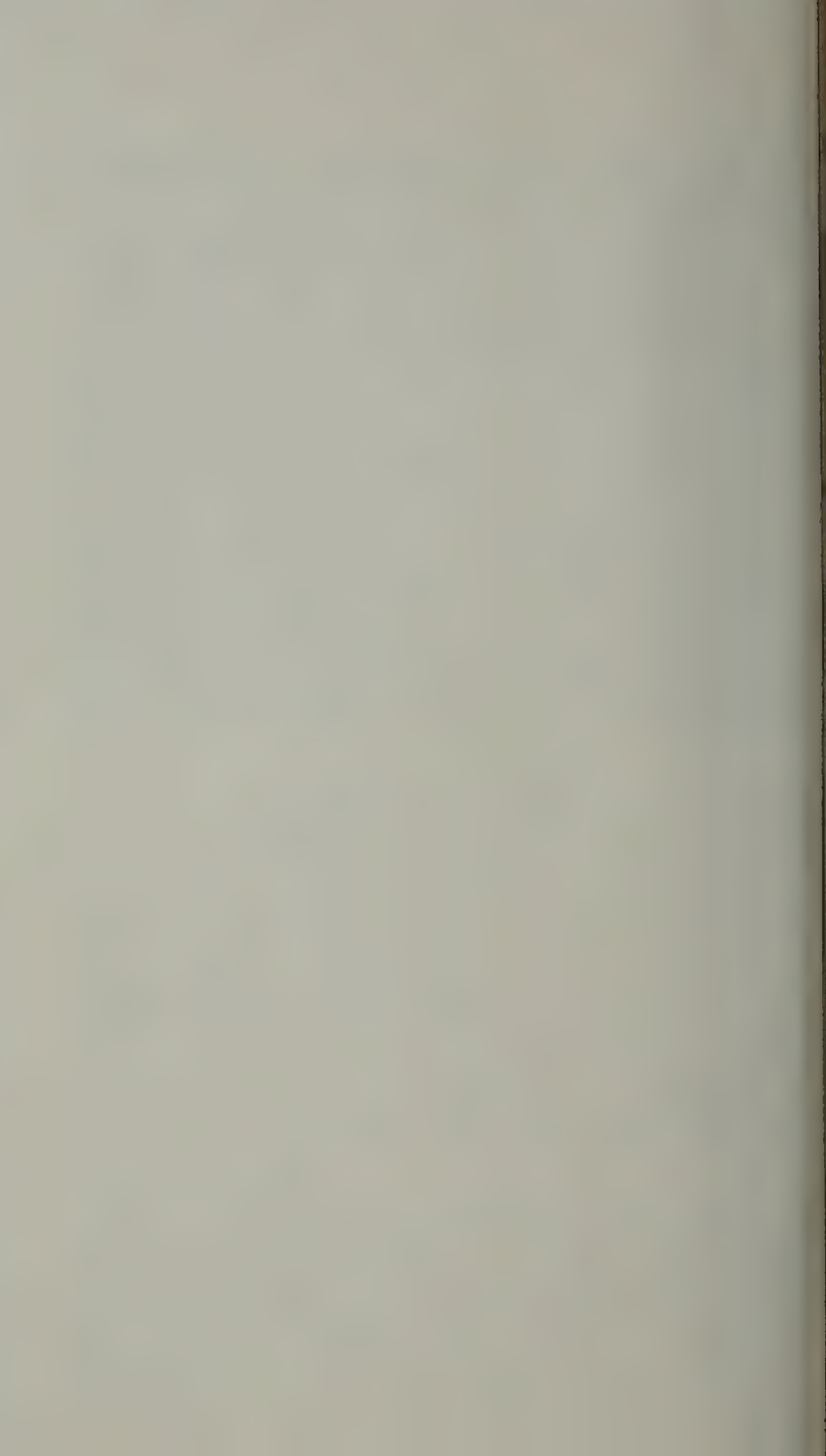
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No. 15146

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REPLY BRIEF ON BEHALF OF APPELLANT,
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No. 15146

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLIFFORD L. DUKE, JR., LOUIS GLEN BALLARD, and VIC
BUONO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF ON BEHALF OF APPELLANT,
LOUIS GLEN BALLARD.

ARGUMENT.

I.

Appellant Ballard Could Not Lawfully Be Indicted for nor Convicted of Violations of United States Code, Title 18, Section 545, nor of Conspiracy to Violate Said Section, on Allegations and Evidence Showing That the Objects, the Importation of Which Were Involved, Were Psittacine Birds.

Ballard refers to his opening brief—and adopts the following language from the Reply Brief of Appellant, Vic Buono:

“* * * When one smuggles psittacine birds, Congress intended he should be prosecuted under the laws re-

lating to psittacine birds. When he smuggles some other commodity, Congress intended he should be prosecuted under the laws relating to that commodity. Common sense makes it clear that Congress did not intend to make both a misdemeanor and felony of the single act of smuggling psittacine birds. It is furthermore clear that Congress did not intend that a psittacine bird smuggler could escape prosecution by presenting his birds at the border in compliance with 19 U. S. C. A., Section 1461, before smuggling them across the line. Yet such is the absurd result which follows from the reasoning of the Government.

“It does not appear necessary at this time to analyze the cases cited by the Government for the proposition that, when two statutes proscribe the same act, the United States Attorney may elect to prosecute under either. It is apparent from a reading of the decision of the Supreme Court of the United States in *Berra v. United States* (1956), 351 U. S. 131; 100 L. Ed. 1013, 76 S. Ct. 685, that two members of that Court believe that such a holding is contrary to the Constitution of the United States, and that the majority of the Court, feeling that the question had not been raised in the *Berra* case, expressly left it open (see p. 135). In these circumstances we respectfully submit that the duty devolves upon this Honorable Court to re-examine the above question in the light of the *Berra* decision, of the United States Constitution, Amendment V, and of the fundamental concept that ours is a government of laws and not of men.”

II.

**The Dignity of the United States Government Will
Not Permit the Conviction of Any Person on
Tainted Testimony.**

Ballard points out in his opening brief that all of the witnesses called by the Government in its case in chief were either convicted of smuggling, conspiracy to smuggle or admitted such illegal participation, except for the witness Thomas E. Johnson. Johnson did not testify to any matter that would justify the verdict as to Counts IV, V or VI (Appellants' Br. p. 7).

The Government in its brief at page 3 admits this situation, but states:

"There follows a résumé of the testimony adduced which it is established must be interpreted in a manner most favorable to the Government."

In *Mesarosh v. United States of America*, Vol. 77, Sup. Ct. Rep., page 1, *et seq.* (Oct. Term, 1956), where a Government witness who had testified against Petitioners and who had given what was deemed false testimony before a Senate Committee, the Supreme Court, speaking through the Chief Justice, said:

"The dignity of the United States Government will not permit the conviction of any person on tainted testimony" (p. 5); and

"(6) Massei, by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not

polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.

“ ‘The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See *McNabb v. United States*, 318 U. S. 332, 63 S. Ct. 608; 87 L. Ed. 819. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.’ *Communist Party v. Subversive Activities Control Board*, 351 U. S. 115, 124, 76 S. Ct. 663, 668.

“(7) The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them. The interests of justice call for a reversal of the judgments below with direction to grant the petitioners a new trial.”

The evidence of Hadzima, Spicuzza, Todd, Curtis, Helm, and Ascani leaves no room for conjecture but that they expected favorable consideration from the Government as a result of their giving their testimony on behalf of the Government.

All of such witnesses who had testified in their own behalf on questions involved in this case admitted that in previous trials they had given testimony contrary to their testimony in the present case.

The conviction of Ballard in this case as to Counts IV, V and VI resulted from tainted testimony.

III.

The Motion of Appellant for a Bill of Particulars as to Counts IV, V and VI Should Have Been Granted.

The Government in its Brief (pp. 102 to 105), in reply to this contention, simply states that the granting of a Bill of Particulars is discretionary with the trial court and that the only reason that Ballard demanded a Bill of Particulars was to ascertain the Government's case, and that under the circumstances it was proper to refuse Ballard's demand for a Bill of Particulars.

From the Indictment which charges a conspiracy in Count IV, between April, 1953, and continuing to December, 1954, etc., how could Ballard have known that the Government would call Deputy Sheriff Johnson of San Diego County to show that Ballard was in February of 1953 in possession of a truck in San Diego County, which truck contained Parakeets; how could Ballard have known that the Government would introduce evidence from Hadzima that from July of 1953 until late in 1954 he (Hadzima) and Ballard engaged in the smuggling of psittacine birds, sharing the proceeds 45 per cent each and giving Appellant, Clifford L. Duke, Jr., 10 per cent thereof—*especially when the last overt act charged in Count IV was on a date in June of 1953.*

Further, this last mentioned evidence related to a separate conspiracy different from that charged in Count IV.

The Government refers to this last mentioned evidence in its brief, pages 9 and 10.

Ballard, prior to the time that the Government made its opening statement, objected to any statement of proof to

be adduced in support of Count IV of the indictment which occurred prior to the date of the conspiracy charged in Count IV of the indictment, and also that which occurred after the date of the last overt act charged in Count IV of the indictment [Tr. 48-52, and Appx. 134-138], citing *Fishwick v. United States*, 329 U. S. 211, 67 S. Ct. 224.

Proper objection was made by Ballard in each instance as the evidence was offered and by the Court overruled.

The Government in its brief (p. 103) cites cases in support of a rule of law, which Ballard concedes:

“The proper function of a bill of particulars is two-fold, to state facts beyond those alleged in the indictment (1) so that the offense involved is sufficiently identified to enable the defendant to plead a conviction or acquittal thereon in bar of a possible second prosecution for the same offense; and (2) so that the defendant is sufficiently advised of the charge to enable him to prepare his defense and not to be surprised at the trial.”

If the Government's theory as to Counts IV and VII in arguing its case against Buono is correct—that is, separate conspiracies because purpose of participants different and having different members in the alleged conspiracy—then can it be said that appellant Ballard could not as of this date be indicted and prosecuted for a separate conspiracy with Duke as his co-defendant and Hadzima as an unindicted co-conspirator, the conspiracy extending from July, 1953, to December, 1954, and the object of the conspiracy, the unlawful smuggling of psittacine birds between those dates, etc.

Therefore, Ballard was entitled to a Bill of Particulars not only to enable him to prepare his defense, but also to enable him to plead a former conviction or acquittal in bar of a possible prosecution for an independent and separate conspiracy.

By the Government's own testimony he was entitled to the Bill of Particulars he sought.

IV.

Appellant Made a Timely Motion for a Severance From His Co-defendants Which Was Denied, and Appellant Was Substantially Prejudiced and Deprived of a Fair Trial by Reason Thereof.

The Government replies to this claim and contention by stating that the matter of a severance is a question entirely within the Court's discretion, and to be reviewed only when there appears to be an abuse of that discretion.

The Government in its Brief (p. 108), cites *Opper v. United States* (1954), 348 U. S. 84 at 94, and emphasizes a quote from the decision as follows:

"It was within the sound discretion of the trial judge as to whether the defendants should be tried together or severally and there is nothing in the record to indicate an abuse of such discretion when petitioner's motion for severance was overruled
* * *."

As the Government states the abstract principles of law appellant Ballard is in accord. In this case, however, *there is something in the record to indicate an abuse of discretion* when Ballard's motion for severance was overruled.

In the Government's Brief, pages 56 and 57, there is set forth a quotation from the appendix, pages 12 and 14

thereof, wherein Appellant Duke was quoted, from the record at the time of arraignment as saying that he had proof to show that certain individuals, including labor leaders and their attorneys, customs officers and members of the United States Attorney's office had entered into a conspiracy to obstruct justice by procuring false evidence to have him falsely indicted by the Grand Jury; that he wanted an early trial for the purpose of proving these matters.

These statements were made on June 3, 1955, in open court at the time of arraignment in Case No. 25276, the pending case and Case No. 25277 where Mr. Duke alone was a defendant (Appx. pp. 3-19).

After the making of these statements in open court before the Honorable Jacob Weinberger, Judge, everyone knew that there would be a dog fight, with the Government seeking to prove its charges and Appellant Duke seeking to prove that the charges were erroneously brought and by whom inspired.

Ballard filed his Notice of Motion to Move for a severance on June 15, 1955 (Appx. pp. 43-44). This motion for severance was heard and denied by the same Judge Weinberger, who had heard Mr. Duke's earlier statements (Appx. pp. 44 and 52-58).

To require Ballard to stand trial with Duke when it appeared, as it did, that the case would be tried in an atmosphere of prejudice and bitterness certainly indicated an abuse of discretion on the part of the judge who overruled the motion for severance; that the situation which developed should have been foreseen is borne out by the record, and appears affirmatively from the briefs of both Duke

and the Government. Throughout the trial there were discussions of what Judge Tolin referred to as Mr. Duke's special defense.

Every argument advanced by Duke tending to show that Duke did not receive a fair trial could be advanced by Ballard, as tending to prove that Ballard was prejudiced by being forced to trial with Appellant Duke. This is true, even as to the arguments that developed during the course of the trial over Duke's right to represent himself because of the difference of opinion that developed between Mr. Fitzgerald, who was attorney of record for Mr. Duke, and Mr. Duke and the discussion of the propriety of introducing certain evidence offered by Mr. Duke. Indeed, some of these discussions took place in the presence of the jury and resulted in the matter complained of by Ballard in his opening brief at pages 27-29. These matters were also discussed and referred to by the Government in its brief, pages 59-65. Appellant Ballard quotes from the Government's Brief, at page 64, as follows:

"See also Tr. 4296-4297. From the foregoing it is clear that throughout the trial appellant Duke consistently adhered to, and acquiesced in, this theory of 'frame up,' 'conspiracy,' or if you will, his 'special defense.' At his instance, and with his tacit approval, the Court followed this theory and admitted evidence, otherwise inadmissible, for the purpose of proving that Duke was the victim of a frame up, or at least an attempt to convict him upon perjured evidence."

It is significant to note that the court, after one of these long discussions with Mr. Duke, as a practical proposition, tried to make Mr. Ballard take sides, either with Mr.

Duke or against him in connection with his special defense; that the colloquy set forth in Appellant's Opening Brief (pp. 27 and 28) resulted. It is also significant to note that in so far as Counts IV, V and VI are concerned, that the conversations wherein the so-called agreement to high-jack the birds smuggled by Spicuzza and Todd were claimed to have occurred, took place in Buono's office, at a time Buono was present, and participated in the conversations and alleged agreements, and although Duke was convicted on the charge contained in Counts IV, V and VI, Buono was acquitted as to these counts. In other words, the evidence would have as readily supported a conviction of Buono as to Counts IV, V and VI, as it would have supported a conviction against Duke. Because Ballard refused to take sides in the case and refused to disavow Duke's claimed special defense, it is Ballard's contention that the jury took sides against Ballard and found him guilty as to Counts IV, V and VI, but because Buono disavowed Duke's special defense, the jury spontaneously acquitted Buono.

The joint trial, plus the question put to Ballard by the Court, plus the many discussions and arguments concerning Duke's special defense which took place in the presence of the jury, the Court's ruling on the admissibility of evidence in support thereof, together with the Court's comments, the discussion of counsel pertaining to this special defense, plus the argument of the Assistant United States Attorney on Duke's special defense, make the refusal of the Court to grant Ballard a severance error so palpable as to need of no further argument.

In *Castellani v. United States*, 64 F. 2d 636, the defendant, a bank president, was charged jointly with two other

officers of the bank in one indictment, and jointly with one of such officers in another indictment. The two cases were ordered consolidated for trial, and the Court of Appeals held that the individual counts of each indictment must be regarded as separate counts of the consolidated indictment, and that each count constituted a separate and distinct offense, not all provable against the same defendants.

The appellant (Castellani) entered a plea of not guilty as to both indictments. His co-defendants entered a plea of guilty as to certain counts of the indictment in which all three were jointly charged and the co-defendants were used as witnesses for the Government. Appellant was convicted of one count of the second indictment, and acquitted of all other charges.

Citing *Pointer's* case, 151 U. S. 376, at page 403, 14 S. Ct. 410, 412, 38 L. Ed. 208, and *McElroy v. United States*, 164 U. S. 76, at page 80, 17 S. Ct. 31, at 32, 41 L. Ed. 355, and quoting from *McElroy* as follows:

“It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried. * * *”

The Court of Appeals reversed Castellani's conviction and ordered a new trial.

In *United States v. Perlstein*, 120 F. 2d 276, where two attorneys and two bootleggers were jointly indicted in two counts each of which charged all four defendants with conspiracy: (1) To obstruct justice, etc., (2) to carry on a business of distillers without giving bond; where the unlawful distillers were convicted on each count, and the

appellants Perlstein and Paul found guilty on the first count only, the Court of Appeals reversed the conviction as to Perlstein because of evidence improperly introduced against him, and in reversing the conviction of Paul at page 283 says:

“The extent of the prejudice to Paul which resulted from the joint trial cannot now be determined but became obvious in many rulings upon the evidence.”

At the risk of belaboring the point that Ballard was entitled to a severance, we refer to the Government's Brief (pp. 2-11) where a statement of the case is set forth:

First the Government sets forth the claimed evidence with reference to Counts One, Two and Three of the indictment. It shows the witnesses Spicuzza, Todd and Hadzima engaged in the smuggling of psittacine birds on a commercial basis prior to 1952, and before any of the three had ever met Appellant Duke. It is claimed that Appellant Duke first met any of these men at a time in early 1953, when Duke defended a man named Vosburg. It is stated that witness Helm was in the early part of 1953 convicted of smuggling. It is stated that after Vosburg's acquittal there was a meeting in Duke's office between Hadzima, Spicuzza, Todd and Helm concerning the flying of psittacine birds into the United States from Mexico. The plan suggested was that Helm was to fly the birds in for the smugglers and real importers Hadzima, Spicuzza and Todd. Although Helm, Hadzima, Spicuzza and Todd had testified in trials in Federal Court in San Diego concerning the smuggling of psittacine birds (cases in which all but Helm were defendants) following the alleged meetings in early 1953 and before the return

of the indictment in this case, this is the first time that a contention was made that Appellant Duke was a party to any conspiracy.

However, now that the stage is set, the jury properly impressed *and inflamed*, we have what is called the high-jacking conspiracy the subject of Count IV, with related Counts V and VI. This came about because "Honest John" Hadzim thought Spicuzza was stealing from him, therefore he would steal from Spicuzza. The contention was and is that Hadzima planned to steal birds after they had been imported by Spicuzza and Todd. The contention is further made that he arranged with Appellant Ballard and one Purselley to steal birds from others in the United States.

Following the so-called high-jacking incident Counts VII, VIII, IX and X refer to what the Government contends is still another situation with Duke and Buono named as defendants. Ballard not named.

It is respectfully submitted that the consolidation of these charges prejudiced the rights of Ballard.

NOTE: Counts IV and I and VII all have different defendants, and the evidence to support Count I would not support a conviction as to Count IV. It is claimed by the Government that the evidence to support Count VII would not support a conviction as to Count IV, and vice versa.

It is of peculiar significance that the birds claimed to be the subject of the agreement in Count IV, and of the smuggling, possession, etc., of Counts IV and V, were actually smuggled by Spicuzza and Todd as the real par-

ties in interest, and yet neither Spicuzza nor Todd were named as unindicted co-conspirators in Count IV.

Counts IV, I and VII all have different unindicted co-conspirators, that is to say, not all unindicted co-conspirators named in one conspiracy are named in the others.

From the evidence set forth in the Government's Statement of Facts, it is apparent that Ballard was not guilty of conspiracy to smuggle birds (Count IV) or of the actual smuggling (Count V). True, he did nothing to prevent any smuggling, but did not initiate it and played no part in the actual planning to smuggle or the smuggling itself. Ballard, on the evidence, may have been guilty of a robbery, or conspiracy to rob, a kidnapping or of an assault with a deadly weapon or by means of force likely to produce great bodily harm—all violations of state law in California, but not of any Federal offense.

As Ballard points out in his Opening Brief (p. 9), "Whether appellant Ballard lived or died, or was unheard of, Spicuzza and Todd would have smuggled birds." They did smuggle the birds in question.

At page 9 of the Government's Brief, referring to the Desert Center affair the Government in its Statement of Facts recites:

"After binding Spicuzza, Appellant Ballard hit him in the head, etc. Tr. 201, 203, 206, 587, 589" and "Ballard, Purselley and Hadzima then loaded the birds into a truck and returned to Burbank, California, where they transported the birds to an aviary belonging to Mary Ascani."

The Government perhaps stated those as facts in the interest of brevity.

Ballard has no transcript of the testimony but submits that the Transcript quoted by the Government [pp. 201, 203, 206, 583, 585 and 587 and accompanying pages] shows that Ballard occupied himself entirely with Spicuzza and Curtis while Hadzima and Purselley loaded the birds and drove away, leaving Ballard with Spicuzza and Curtis for several hours after Hadzima and Purselley left, and that Hadzima alone delivered the birds to Mary Ascani. Ballard never touched the birds and, unless by his conduct it can be said that he aided and abetted Hadzima and Purselley in a violation of the charge contained in Count VI of the indictment, he could not lawfully be convicted of that Count.

V.

Ballard Deprived of His Constitutional Right.

The Government in its brief argues that the contention of Ballard that he was prejudiced by the Court's intervention with the questions (see Op. Br. pp. 27-28) concerning Ballard's position, and that the conduct of the Court was in violation of the Fifth Amendment to the United States Constitution, was an allegation, and not explained.

A defendant in a criminal case in Federal Court need not urge anything, need not support nor disavow a contention urged by a co-defendant. This seems to be Hornbook law.

VI.

**The Court Erred in One Material Instruction
Prejudicial to Ballard.**

The instruction complained of is set forth in Appellant's Opening Brief, pages 31 and 32.

It is difficult for a jury to forget when the Court gives instructions to tell the jury that it should scrutinize the testimony of a witness called to establish an alibi on behalf of a defendant. In effect, this characterizes such witness more or less as though the witness were an accomplice, whose testimony is by law required to be scrutinized carefully.

An abstract instruction as to the law pertaining to the defense of alibi cannot cure such an admonitory instruction, because the effect of such admonitory instruction is as much as to tell the jury that the testimony of the alibi witnesses is probably untrue.

“The defendant has no burden of proof to sustain as to an alibi, if the proof in relation thereto raises a reasonable doubt as to his guilt, he is entitled to an acquittal.”

Falgout v. United States, 279 Fed. 513.

Conclusion.

For the reasons set forth herein, and in his Opening Brief, Appellant Ballard's convictions on Counts IV, V and VI were the result of error.

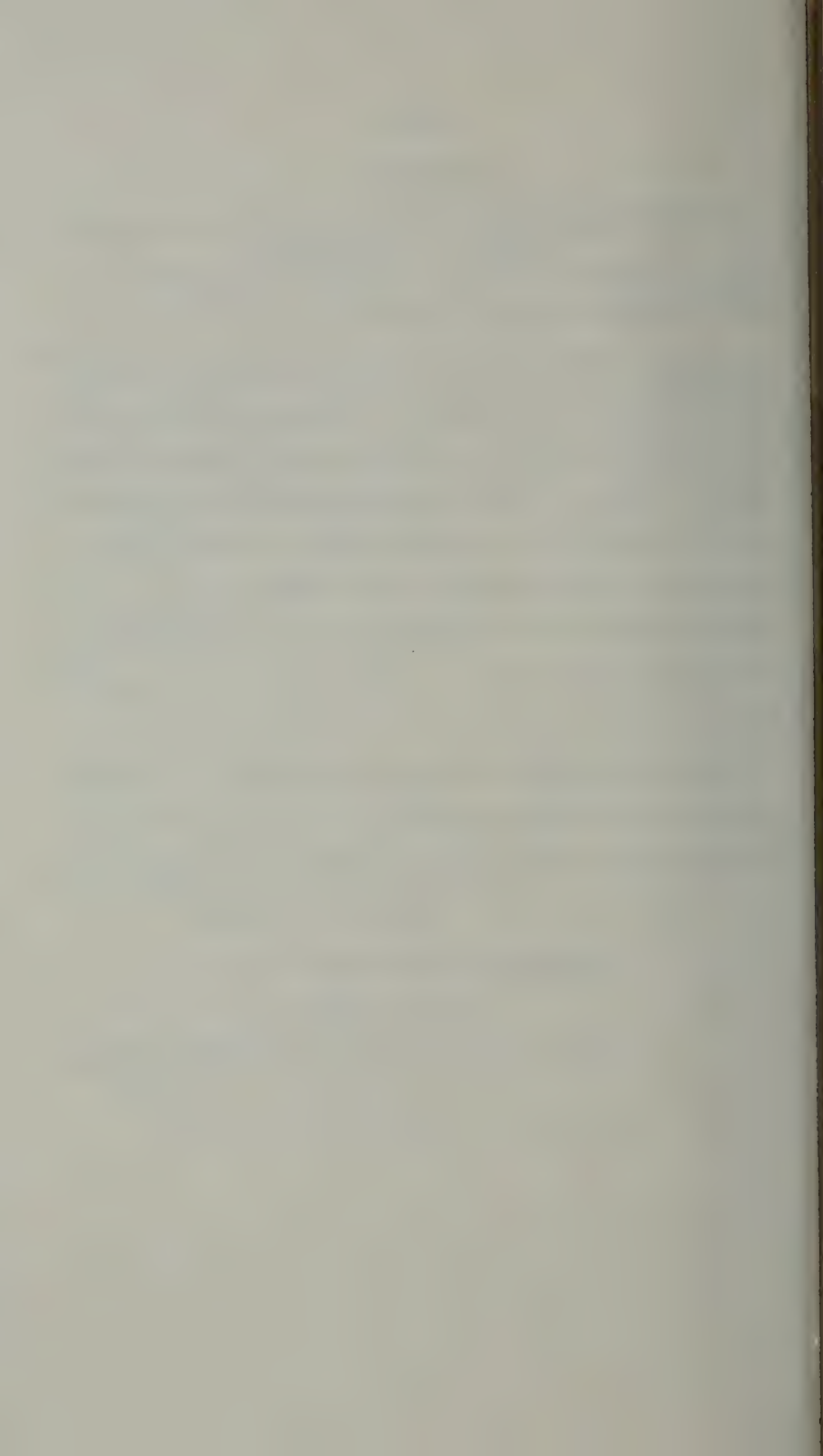
Appellant Ballard believes that the evidence was insufficient to justify his conviction, but that because of the prejudice he suffered by being required to stand trial with Appellant Duke, the trial court's action in inviting him to take the position as to whether he stood with Duke or against him with reference to the special defense, coupled with the evidence of claimed brutality on the part of Ballard at the Desert Center incident, resulted in his conviction.

Ballard respectfully submits that under the circumstances of the whole case it was impossible for him to have received a fair and impartial trial and because of the errors complained of he is entitled to a reversal.

Respectfully submitted,

THOMAS WHELAN,

Attorney for Appellant, Louis Glen Ballard.



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I.

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Appellant contends that the importation of psittacine birds into the United States under circumstances presented in the case at bar is not punishable as a felony under Title 18, U. S. C. A., Section 545, but only as a misdemeanor under 42 U. S. C. A., Section 271a. Appellee asserts that appellants may be punished as violators of both sections, and that the Government may elect under which section it will proceed.

The Government's argument seems to require a clarification of appellant Buono's position in certain respects. On page 27 of his brief the United States Attorney suggests that appellant's contentions lead to the absurdity that a government agency may repeal, supersede or modify any specific Congressional enactment at any time by the issuance of a regulation. Such a result would surely be absurd, but it does not follow from appellant Buono's position. Administrative regulations having the effect of law can only be promulgated upon specific authority of Congress. If they are in conflict with Congressional enactments, that is, if they exceed the authority granted by Congress, they are invalid. If the Surgeon General's regulations relating to psittacine birds are in conflict with any Congressional enactment, they are invalid. We doubt that the Government will contend that the regulations are invalid. Appellant Buono's position is that the two statutes are not in conflict, but that, since they are *in pari materia*, they must be construed together, and that the specific must be considered to govern the general. When one finds statutes proscribing murder, manslaughter and battery, one does not ask which statute the legislature enacted first, nor engage in lengthy discussions as to whether the later worked an implied repeal of the earlier. Such matters are only considered as a last resort, when there is no other way to harmonize the respective statutes. It is well understood in the instance cited that the three statutes are construed together, and each is given effect in its proper sphere. When murder is done, the proper prosecution is for murder, not battery or manslaughter, although the defendant probably would not complain, if the charge were brought under either of the other two statutes. So in the case at bar the Surgeon General's regulation and the gen-

eral smuggling statute should be construed together as evidencing a single Congressional intent. When one smuggles psittacine birds, Congress intended he should be prosecuted under the laws relating to psittacine birds. When he smuggles some other commodity, Congress intended he should be prosecuted under the laws relating to that commodity. Common sense makes it clear that Congress did not intend to make both a misdemeanor and felony of the single act of smuggling psittacine birds. It is furthermore clear that Congress did not intend that a psittacine bird smuggler could escape prosecution as a felon by presenting his birds at the border in compliance with 19 U. S. C. A., Section 1461, before smuggling them across the line. Yet such is the absurd result which follows from the reasoning of the Government.

It does not appear necessary at this time to analyze the cases cited by the Government for the proposition that, when two statutes proscribe the same act, the United States Attorney may elect to prosecute under either. It is apparent from a reading of the decision of the Supreme Court of the United States in *Berra v. United States* (1956), 351 U. S. 131, 100 L. Ed. 1013, 76 S. Ct. 685, that two members of that Court believe that such a holding is contrary to the Constitution of the United States, and that the majority of the Court, feeling that the question had not been raised in the *Berra* case, expressly left it open (see p. 135). In these circumstances we respectfully submit that the duty devolves upon this Honorable Court to re-examine the above question in the light of the *Berra* decision, of the United States Constitution, Amendment V, and of the fundamental concept that ours is a government of laws and not of men.

II.

Appellant Buono Could Not Lawfully Be Indicted for nor Convicted of the Conspiracy Purportedly Charged in Count VII of the Indictment, in View of the Failure of the Government to Allege or Prove Facts Which Would Support the Conclusion That Such Purported Conspiracy Had Any Existence Separate From the Conspiracy Charged in Count IV.

Appellant Buono contends that he was improperly convicted under count VII of the indictment, because the allegations in that count and the evidence offered thereunder showed no conspiracy separate and distinct from that alleged in count IV, of which appellant Buono was acquitted. Appellee does not dispute Buono's position as to the law, but argues that the evidence in the case at bar shows three separate conspiracies. The Government does not discuss Buono's contention that he had the right to be informed in advance of trial as to the basis upon which the Government would seek to establish that the two conspiracies with which he was charged were separate.

The United States Attorney has set forth the facts in the case at bar in his brief. (Appellee's Br., pp. 2-11.) We submit that upon reading that statement a person of ordinary understanding could only conclude that all the facts relate to but one conspiracy. That conspiracy had as its object the smuggling of psittacine birds into the United States for sale. It commenced when John Hadzima found it necessary to take in a partner to help him in his smuggling business. (Appellee's Br., p. 3.) It continued throughout all the times mentioned in the Government's statement of facts. Past experience indicates that it would be unwise to conclude that it has terminated

yet. The Government's statement indicates that from time to time there were changes of personnel. (Appellee's Br., pp. 4-6.) It also appears that there were disputes over how the proceeds of the smuggling were to be divided and that the various conspirators frequently engaged in the practice of trying to cheat one another. (Appellee's Br., pp. 6-10.) However, the changes of personnel and the attempts to secure a greater share of the profits were always subordinate to the fundamental object of the undertaking—the smuggling of birds.

In spite of the clarity with which the unitary character of the conspiracy appears from the Government's recital of the facts, it argues that the whole can be subdivided into several smaller conspiracies. We turn, therefore, to a consideration of the bases upon which the Government seeks to establish the multiplicity of conspiracies. (Appellee's Br., pp. 112-116.) Of course, appellant Buono is only directly concerned with the matter of whether counts IV and VII allege separate conspiracies. However, in order to keep the matter in its full context, we will discuss each of the subdivisions the Government attempts to make.

The United States Attorney commences his discussion of the multiple conspiracy theory with the proposition that the count I conspiracy was a new one formed in 1953 between Helm, Duke and the smugglers to smuggle birds by airplane. (Appellee's Br., p. 113.) In fact, it appears from the Government's statement of facts that **this was** merely a continuation of the old Hadzima-Spicuzza, *et al.*, conspiracy which had been involved in the *Steiner* case. (Appellee's Br., pp. 3-6.) There was merely an addition of two members, Duke and Helm, for the purpose of

remedying the temporary setback suffered by the conspirators as a result of the loss of their "mules." (Appellee's Br., pp. 4-5.) Helm was, in effect, nothing more than a new "mule" provided by Duke.

The United States Attorney next seeks to separate the so-called count IV conspiracy from that charged in count I. (Appellee's Br., pp. 114-115.) He notes changes in personnel, although he knows full well that adding or dropping members does not create a new conspiracy. (*United States v. Witt*, 2 Cir., 215 F. 2d 580.) Furthermore, the personnel differences are not as distinct as it might appear from counsel's list. Buono may not properly be included as a conspirator, since the jury acquitted him of participation. Of those referred to as, "conspicuously absent," Vosburg, Segovia and Hamm had been inactive since before the alleged inception of the count I conspiracy. (Appellee's Br., pp. 4-5.) Todd and Spicuzza, although not named as unindicted co-conspirators, were proved to have been such. As the United States Attorney points out a few sentences later in the same paragraph, they were the Mexican contact men for the smuggling. One of the overt acts alleged in count IV was the smuggling of a load of psittacine birds for which Spicuzza arranged. (Appellee's Br., pp. 8, 16.) The conspiratorial object alleged in count IV was identical to that alleged in counts I and VII—the smuggling of psittacine birds into the United States for sale. (Appellee's Br., pp. 12, 15-16, 18-19.) Nowhere does the indictment refer in any way to, "hi-jacking," as an object of a conspiracy or otherwise. The evidence shows that the hi-jacking was merely a form of the cheating of each other which the conspirators had practiced as an incident to their smuggling conspiracy from its original inception, that hi-jacking was

futile without successful smuggling, and that, when the hi-jacking began to interfere with the smuggling, the hi-jacking was immediately stopped. It is apparent that the alleged count IV conspiracy was continuous in time with that alleged in count I, and that its object, the smuggling of psittacine birds into the United States for sale, was the same. That purpose was carried out by the same personnel performing the same functions as they had performed in the count I conspiracy. The conspiracies alleged in counts I and IV were one and the same.

Appellee's attempt to make a separate conspiracy of count VII is equally futile. He relies upon a supposed difference in locale. Both counts allege San Diego and Imperial Counties, but they differ in that count IV includes Riverside, while count VII adds Los Angeles. This supposed distinction is so trivial as to be absurd, when one considers that throughout the period involved in this case the conspirators were operating throughout the United States and Mexico, and even in Europe. Counsel again seeks to distinguish the two counts on the basis of differences in personnel. The supposed differences are not impressive, especially when one considers that the smuggling under both counts was carried on by the same persons in the same way. Furthermore, as we have already seen, changes in personnel are not a basis for finding separate conspiracies.

Counsel also seeks to distinguish count IV from count VII on the basis of the presence or absence of, "hi-jacking." We have already seen that "hi-jacking" was only incidental to the alleged count IV conspiracy and was not referred to in the indictment. It is, therefore, not a basis for distinguishing count IV from count VII. Furthermore, "hi-jacking" does not appear to be restricted to

count IV. The Government states that it occurred during the count I period. (Appellee's Br., p. 6.) Counsel also states on page 115 that appellants entered the count VII conspiracy in order to restore the fortunes of Todd and Spicuzza, so that they might hi-jack them further in the future. If this be so, the hi-jacking element is common to counts IV and VII and no possible distinction can be made between them on the basis of it.

For the foregoing reasons we respectfully submit that the Government's attempt to subdivide the single conspiracy shown by the evidence in the case at bar is unsound. Appellant Buono's conviction on count VII and on counts VIII, IX and X based thereon was, therefore, erroneous and must be reversed.

Conclusion.

For the reasons set forth herein and in his Opening Brief, appellant Buono's convictions on counts VII, VIII, IX and X were the result of error. Since the convictions could not have occurred in the absence of the errors, the errors were necessarily prejudicial. Furthermore, while the evidence of wrongdoing in the case at bar was overwhelming, the evidence tending to connect appellant Buono with that wrongdoing was singularly tenuous and unconvincing. We respectfully submit that appellant Buono is not guilty of any offense, and that justice will be done by reversing the judgment of conviction as to him.

Respectfully submitted,

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United States Court of Appeals
FOR THE NINTH CIRCUIT

CLIFFORD L. DUKE, Jr.,
LOUIS GLEN BALLARD,
and VIC BUONO,

Appellants,

vs.,

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF
ON BEHALF OF APPELLANT
CLIFFORD L. DUKE, JR.

BARTON C. SHEELA, JR.,
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FILED

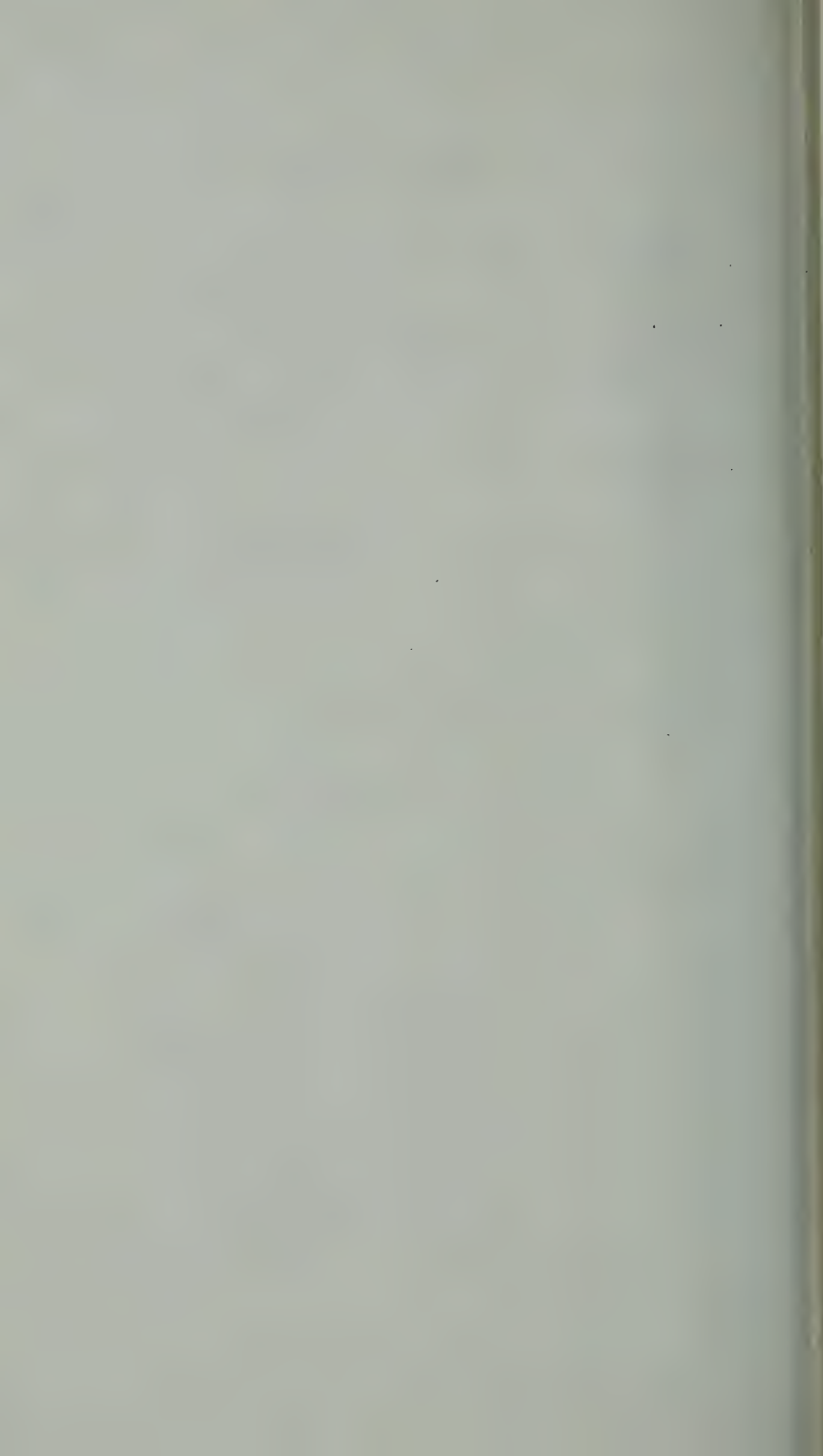
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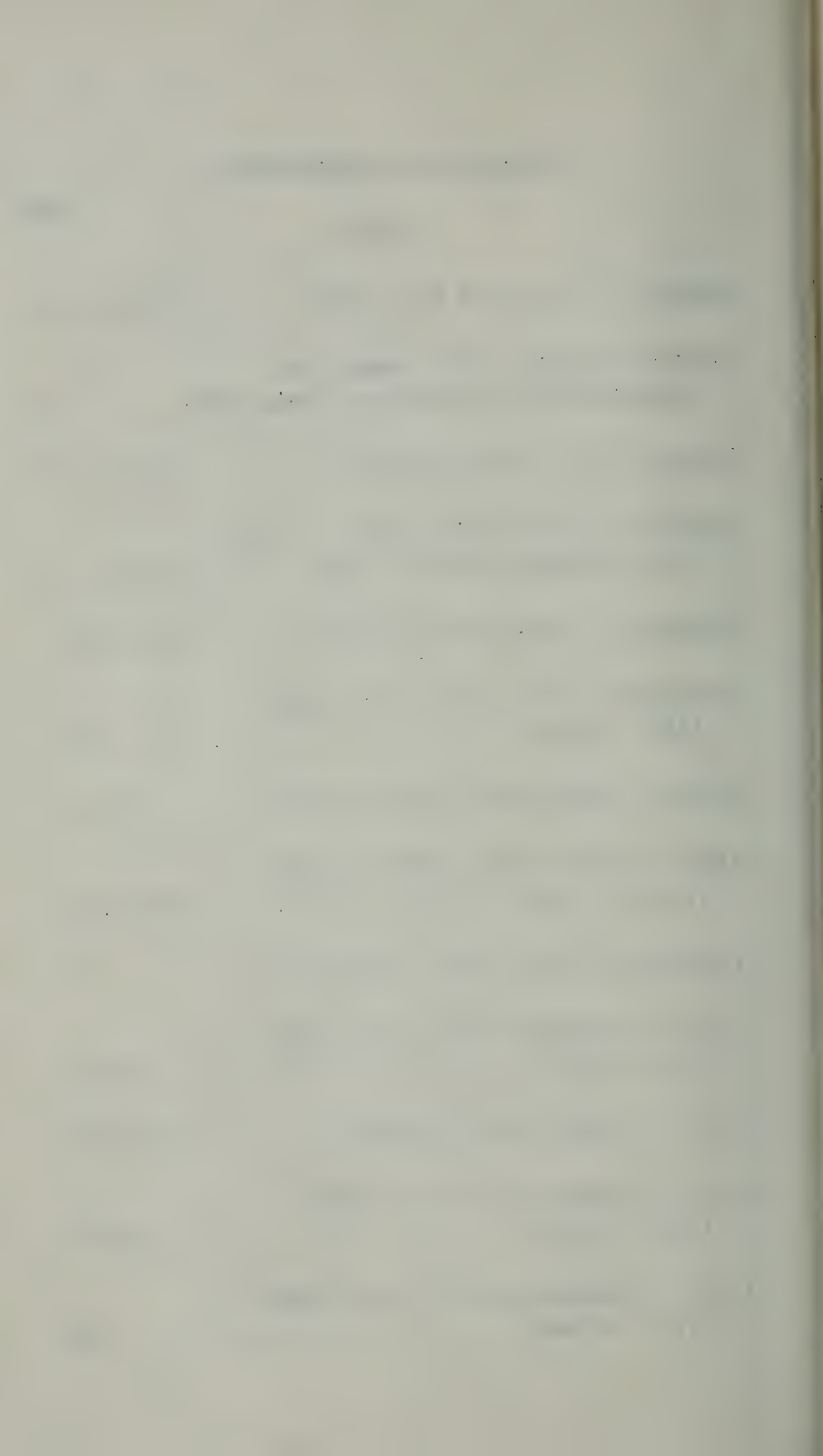


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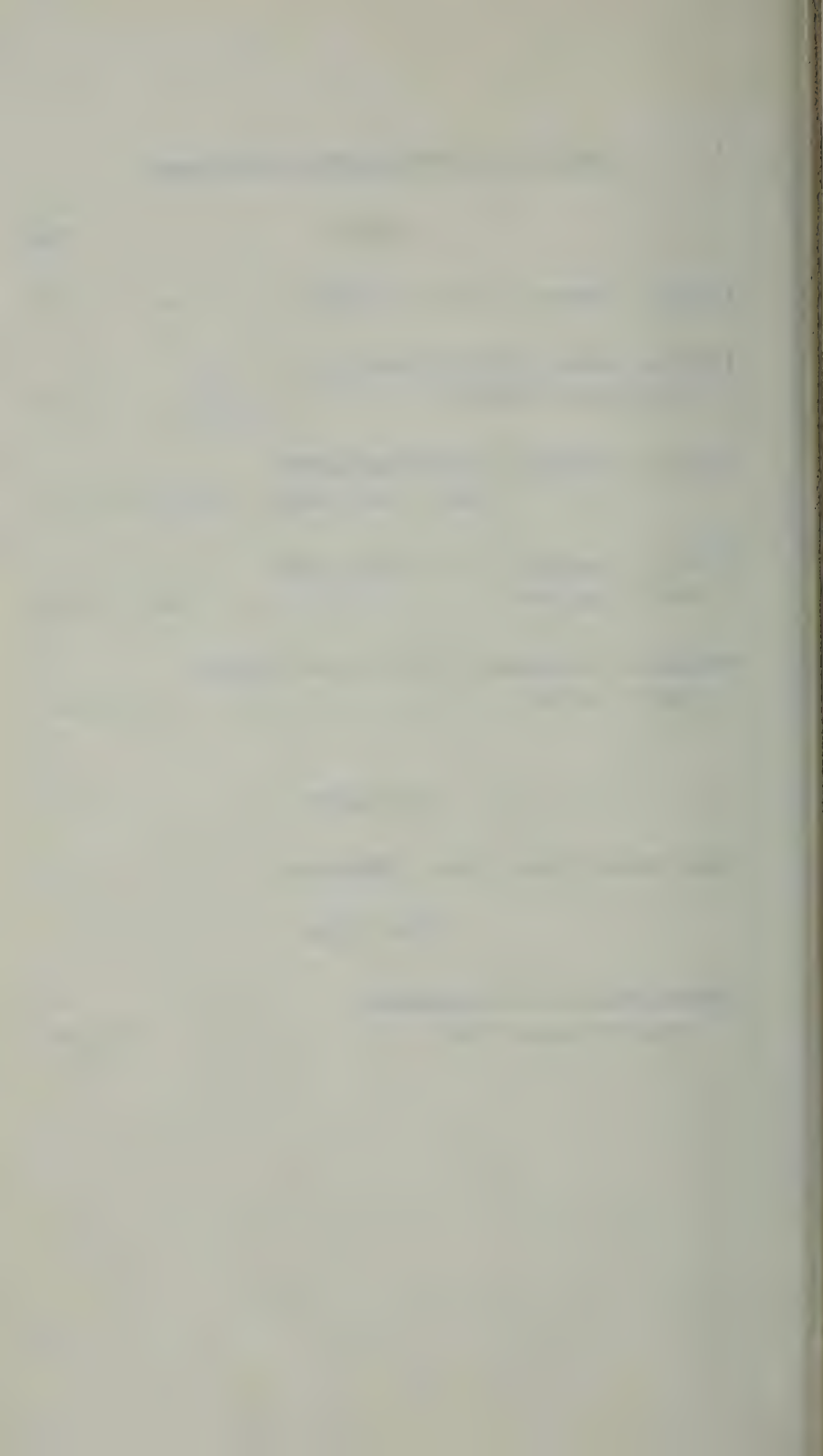
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No. 15146

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLIFFORD L. DUKE, JR., LOUIS
GLEN BALLARD and VIC BUONO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF
ON BEHALF OF APPELLANT
CLIFFORD L. DUKE, JR.

INTRODUCTION

This reply brief is confined to one issue. That is the issue arising under the Sixth Amendment of the United States Constitution.

Appellant submits the remaining questions on the argument heretofore presented in the opening brief, except however Appellant believes that the point of Appellee (failed to comply with rules) on three of the questions is well taken and Appellant withdraws or concedes the following:

Question 7; Question 10 (a) and (c)

CHAPTER I

OF THE NATURE AND EXTENT OF THE SUBJECT

THE first object of this inquiry is to determine the nature and extent of the subject, and to ascertain the principles which govern its development.

The second object is to trace the history of the subject, and to show how it has been treated by the various writers who have preceded us.

The third object is to examine the principles which govern the subject, and to show how they are applied in practice.

The fourth object is to discuss the various questions which arise in connection with the subject, and to show how they are resolved.

The fifth object is to point out the various errors which are commonly committed in the treatment of the subject, and to show how they may be avoided.

The sixth object is to show the various applications of the subject, and to point out the various uses to which it may be put.

The seventh object is to show the various consequences which follow from the principles of the subject, and to point out the various results which may be expected.

The eighth object is to show the various objections which have been made to the principles of the subject, and to point out the various answers which may be given to them.

The ninth object is to show the various advantages which result from the study of the subject, and to point out the various benefits which may be derived from it.

The tenth object is to show the various difficulties which attend the study of the subject, and to point out the various means which may be used to overcome them.

The eleventh object is to show the various questions which remain to be discussed, and to point out the various methods which may be used to solve them.

The twelfth object is to show the various conclusions which may be drawn from the principles of the subject, and to point out the various results which may be expected.

Appellant claims that his trial was had in violation of the Sixth Amendment to the United States Constitution. The issue arises out of the following ultimate facts which are based on the proceedings of August 3rd and 4th, 1955.

1. Appellant was his own counsel in charge of his case at the commencement of the trial and Appellant did not at any time intentionally or otherwise relinquish control of his case or give up the status as his own counsel, but on the contrary, endeavored continually to preserve that status; (Tr. 27-44) (36-A-1 to A-3; 36-A-160 - 36-A-171)

2. The court prevented Appellant from electing to proceed in propria persona initially on August 3rd, by imposing a condition which impaired the right, and again on August 4th by denying Appellant's timely motion to be permitted to dispense with a lawyer's aid and proceed alone; (Tr 28; 36-A-2)

3. Appellant was in good faith attempting to exercise his right to represent himself solely because he was the only person who was prepared and no good reason appears for preventing his doing so; (36-A-163; 36-A-166; 36-A-170)

4. The court's ruling in effect compelled Appellant over objection to proceed to trial with a lawyer admittedly unprepared to give him any effective representation. (36-A-160; 36-A-164; 36-A-171)

SOLE QUESTION OF LAW

Does the provision of the Sixth Amendment that the "accused shall enjoy the right . . . to have the assistance of counsel for his defense" include a correlative right to dispense with a lawyer's help and proceed alone?



THE SIXTH AMENDMENT
RESTATEMENT OF THE UNCONTESTED ISSUE

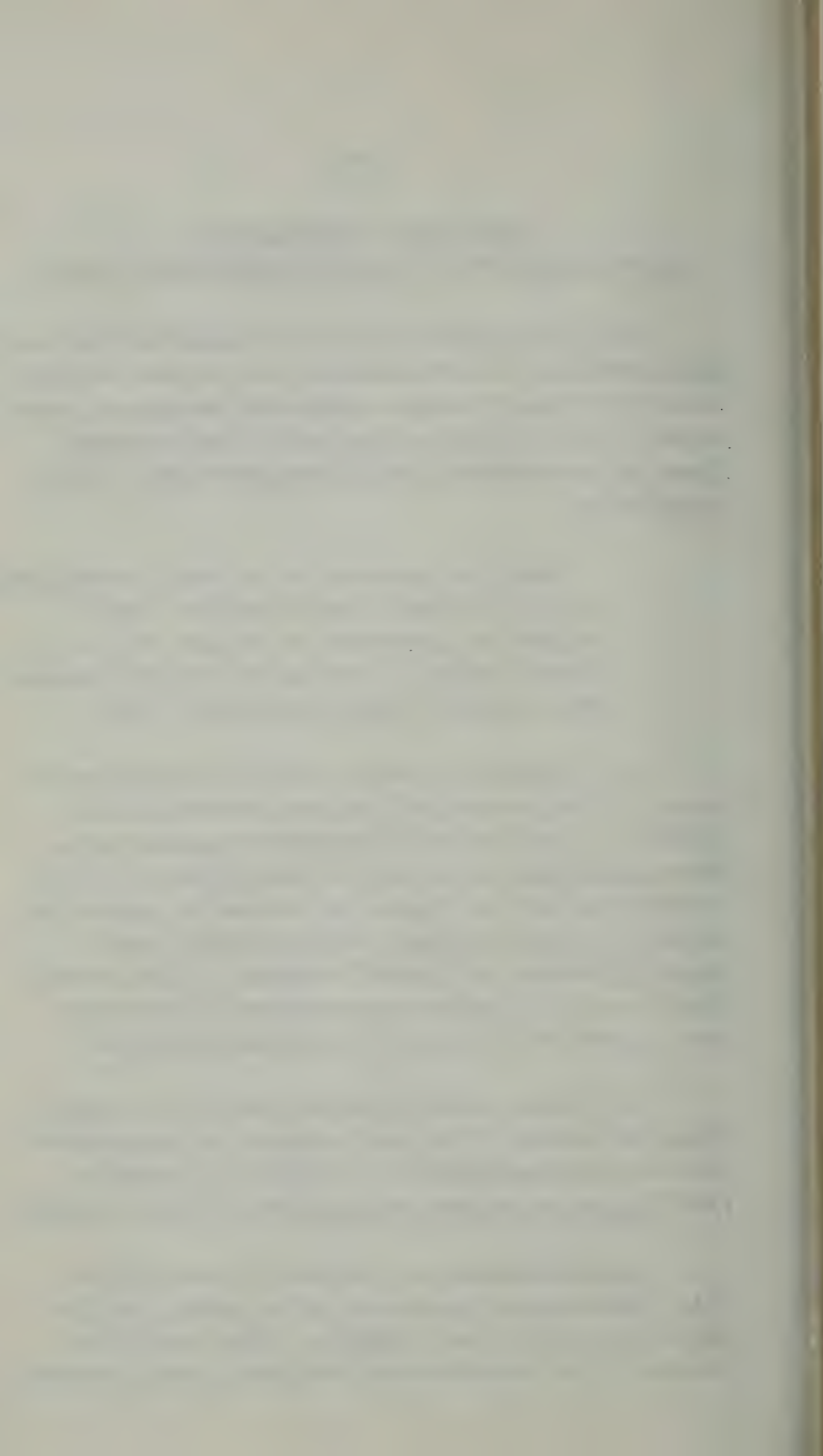
It is with regret that we are compelled to direct this Honorable Court's attention to a portion of Appellee's brief which creates a distorted version of a segment of the trial proceedings and of the important issue of constitutional law arising therefrom. That question is:

Does the provision of the Sixth Amendment that the "accused shall enjoy the right . . . to have the assistance of counsel for his defense" include a correlative right to dispense with a lawyer's help and proceed alone?

It is Appellant's position that an affirmative answer to this question will require reversal of the judgment. In the event the question is answered in the negative then there are secondary questions concerning whether the right of an accused to appear and defend in propria persona without counsel is protected by statute and judicial decision; if the accused has no such right either constitutional or statutory, then a question of abuse of discretion would rise.

The constitutional question specifically arises from the rulings of the court made at the inception of the trial denying Appellant the right to proceed to trial in propria persona without the aid of any counsel.

Appellee makes no reference whatsoever to this constitutional question or to the ruling, but instead has selected and argued an issue based on a portion of the record quoted completely out of context.



In view of this obvious distortion Appellant feels compelled to review the position of Appellant, Appellee and the record so as to leave no question with respect to the issue raised by this Appellant in this phase of the appeal and the existence of the facts which give rise to that issue.

Appellee commences the argument on the constitutional issue with the following topic heading at page 46 of their brief:

"Appellant Duke's Constitutional Rights Under the Fifth and Sixth Amendments Were Not Infringed by Reason of the Rulings of the Court Requiring Him to Elect Whether He Would Accept Counsel or Would Proceed in Propria Persona."

Appellee then states what he perceives to be the factual setting for this topic at page 46:

". . . At the commencement of the trial below appellant Duke sought to associate Clifford Fitzgerald, Esq. , a member of the San Diego Bar. At this point he was informed by the Court below that he could either appear in propria persona or could be represented by counsel but that he could not do both simultaneously. It is this ruling, basically, which gives rise to this particular ground of appeal . . ."

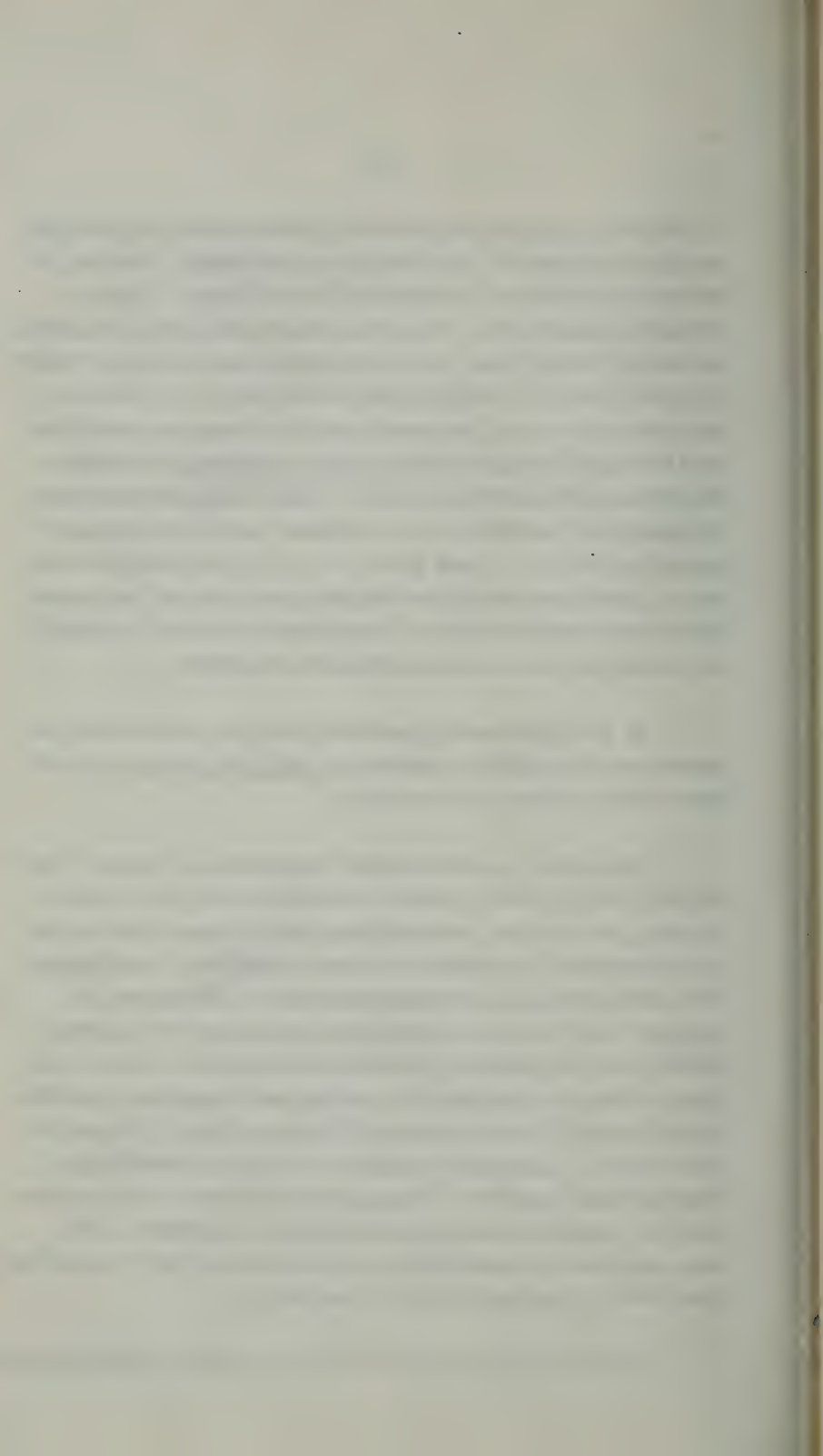
Implicit in the statement of Appellee is the assumption that Appellant was given the right to make a free choice between two complete alternatives. That

is either to appear as his own counsel and be permitted to exercise all the functions incidental thereto, or select an attorney to conduct his defense. That is patently incorrect. The trial court did not at this time or at any other time give this Appellant an opportunity to elect freely. What Appellee neglects to point out was that the court imposed such an onerous condition on the right to appear in propria persona, that such right was effectively denied. This condition was that if Appellant testified as a witness then he could not argue to the jury, and thus, at a critical stage of the case Appellant would be without any counsel because the court had said that if Appellant defended himself he could not have the assistance of anyone.

It is Appellant's position that the conditions imposed on the right to appear in propria persona in effect was a denial of that right.

Appellee, in their brief beginning at page 47 and ending on page 53, quoted excerpts from the record during part of the proceedings which gave rise to the constitutional question with two significant omissions. The first was the proceedings on the afternoon of August 3rd, wherein Appellant explained with great detail the impossible position in which the court had placed him by the earlier ruling and insisting that the court permit him to conduct his own case at least at the outset. Likewise omitted are the proceedings which show that Mr. Fitzgerald was never made counsel for Appellant as the court later contended, but was expressly associated as co-counsel with Appellant and with the permission of the court.

The second omission which in effect distorts and



changes the entire complexion of the proceedings occurs with respect to portions of the record quoted from the proceedings had on the morning of August 4th, just prior to the commencement of the trial in the presence of the jury. Here Appellee quotes in detail portions containing the final ruling of the court to the effect that Appellant was under an obligation to appear in propria persona, or to be represented by counsel but could not do both. The record shows that the court proceeded to outline the precise areas in which Appellant would be permitted to participate to a limited extent. As appears in the brief of Appellee, Appellant at that time requested permission to at least be permitted to open the case before the jury because he alone was prepared. From Appellee's brief it would appear that the proceedings ended upon the denial of this motion for the rest of the proceedings are omitted and at this point Appellant states at page 53:

"...While an accused is entitled to assistance of counsel in a Federal criminal case or is entitled to appear in propria persona and conduct his own defense, the choice is in the alternative and not the cumulative. The accused must make his choice..."

No further excerpts from the record pertaining to this question are set forth, nor is there any further reference to these proceedings, and Appellee finally concludes the entire argument on this constitutional question at page 65 of their brief with the following statement:

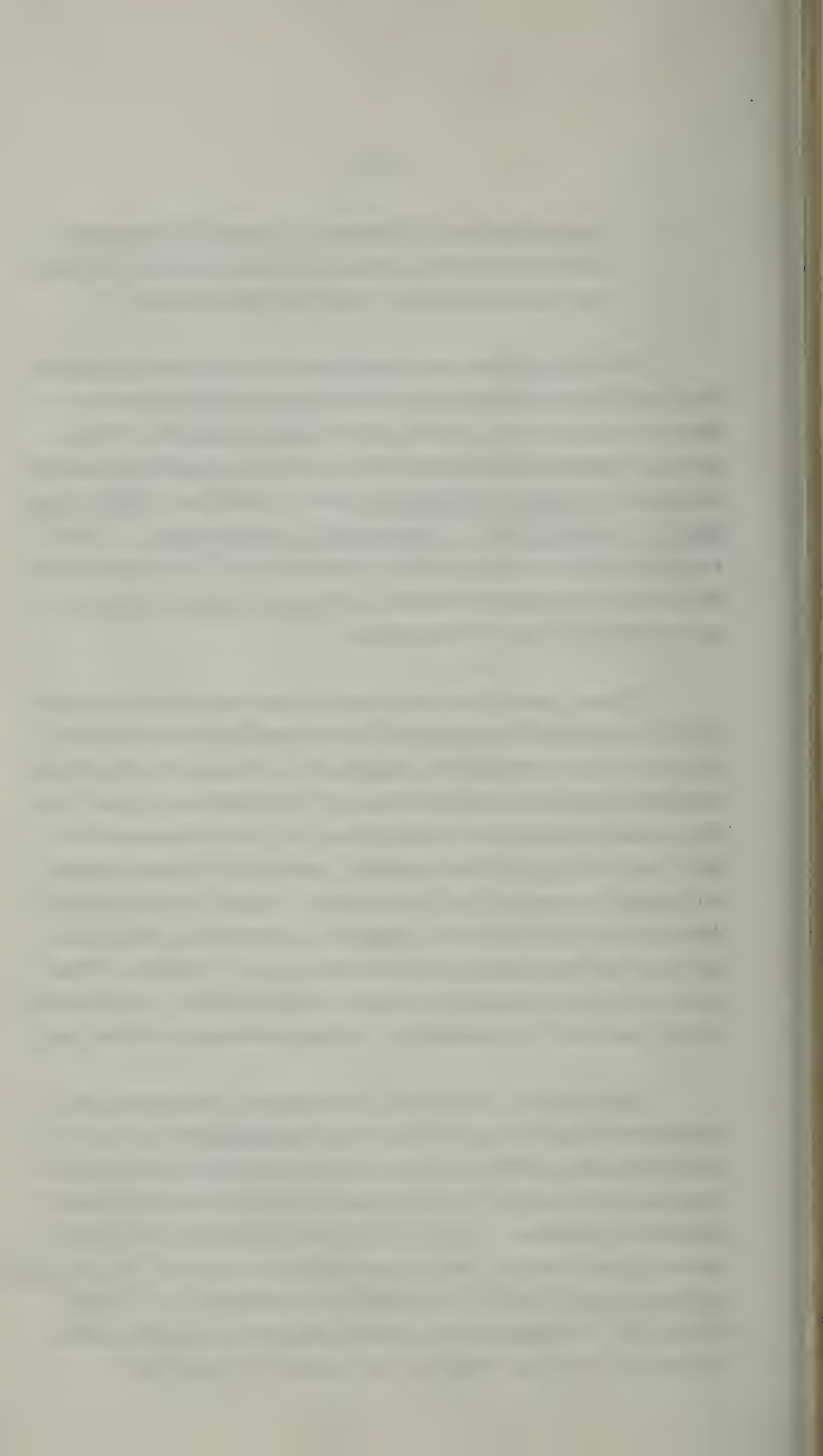
"The orders of the Court in denying Duke

'permission to appear in propria persona and by counsel simultaneously were correct and no prejudice resulted therefrom. "

What Appellee omitted from the above proceedings and which appears as the very next statement was the inquiry by Appellant concerning Mr. Fitzgerald withdrawing from the case so Appellant could proceed in propria persona alone, and the court's refusal to permit Mr. Fitzgerald's withdrawal. The record then reveals that following brief argument on the matter Appellant made a formal motion that the court relieve Mr. Fitzgerald.

Thus, when the portion of the record is placed back in context it appears that Appellee's statement that the court required Appellant to make an election which Appellant refused has no foundation in fact for the record discloses that when the court announced its final ruling on the matter, which had been under submission since the day before, Appellant promptly elected to exercise his right to proceed as his counsel and so moved the court for leave to do so. The record shows that this motion was denied, and thereafter the trial commenced in the presence of the jury.

Although a review of the entire proceedings commencing the day before are necessary for a full understanding of the issue, it is this particular motion and its denial that forms the basis for the constitutional question. Appellant contends that the court never gave him a free opportunity to appear in propria persona and finally absolutely prevented him from doing so. Although the court imposed an untenable condition on him right at the outset, Appellant



nonetheless after due consideration of the serious limitations elected to proceed in propria persona even though it meant forfeiting his right to argue at the conclusion of the case. The court, though seeming to indicate Appellant had the right to make such an election, still denied the motion.

Now the issue stated by Appellee is simply not present. We believe it is abundantly clear from the opening brief that this Appellant's basic complaint concerned itself with the order of the court at the inception of the trial denying Appellant's request to be permitted to act as his own counsel alone and not simultaneously with anyone else.

In this Appellant's opening brief, Topic I, B, page 47, it is stated that the issue raised by Appellant involves the rulings of the trial court denying Appellant the right to proceed to trial as his own counsel and in the pages following, 48 through 53, inclusive, the proceedings prior to the commencement of trial in the presence of the jury are related. Likewise, practically the entire record during this portion has been quoted verbatim in the Appendix to Appellant's opening brief in Volume II, pages 84 to 134. Also, the authorities cited by Appellant and the argument particularly on page 53 of the opening brief, wherein Appellant explains that he wanted Mr. Fitzgerald out of the case before the trial commenced in the presence of the jury, demonstrate the nature of Appellants' complaint.

It is fundamental that on appeal Appellant selects the rulings which he desires to assign as error and presents them to this Honorable Court with

proper specifications and arguments supported by the record below. It is the duty of the Appellee to respond to the questions raised by Appellant. Appellee is not privileged to select an issue more convenient to answer and thereby ignore those raised by Appellant. That is precisely what has happened in this case. It would seem that an issue involving the proper application and interpretation of the Sixth Amendment to the Constitution at least merits as much attention as a question involving the good taste or good sense of the Appellant in suggesting that this prosecution was the result of a certain amount of wrongdoing on the part of others.

Although the proceedings of August 3rd and 4th have been discussed and quoted at length, in view of the confusion that has arisen excerpts taken from the record of those proceedings are attached to this brief as an Appendix.

Quoted below are two brief excerpts from the record. The first is the initial statement of the court on August 3rd to Appellant pertaining to Appellant conducting his own case, and the record in the final order of the Court denying appellant's motion.

AUGUST 3rd

"MR. DUKE: I am representing myself, your Honor, associating Mr. Fitzgerald."

"THE COURT: You can't do that. Is Mr. Fitzgerald of record?"

"MR. DUKE: No, your Honor."

"THE COURT: You had better get yourself a lawyer of record, of if you are going to defend yourself, bear in mind the rule. Now, I don't know how firm a rule it is, but it is a rule that those who give testimony cannot argue the case to the jury. And if you intend to testify, bear in mind that there are rules which would prevent your arguing the case to the jury, if you do that. If you want Mr. Fitzgerald to be your attorney, get him of record. If he is of record you cannot act in pro per or as an attorney with him."

AUGUST 4th

"MR. DUKE: If Mr. Fitzgerald withdrew from the case I would be permitted to proceed in proper?"

"THE COURT: I am not going to permit him to withdraw at this time."

"MR. DUKE: I don't know whether I formally moved or not. I do at this time formally move the court to allow Mr. Fitzgerald to be released."

"THE COURT: Denied."

(Tr. p. 28; 42; 44)

III.

ARGUMENT

A. COURT DENIED APPELLANT THE OPPORTUNITY TO ENJOY THE RIGHT TO HAVE THE ASSISTANCE OF COUNSEL CONTRARY TO THE SIXTH AMENDMENT OF THE CONSTITUTION AND BY REASON THEREOF THE JUDGMENT OF CONVICTION IS VOID.

1. BY REASON OF THE SIXTH AMENDMENT AS INTERPRETED BY STATUTES AND AND JUDICIAL DECISIONS AN ACCUSED HAS AN ABSOLUTE RIGHT TO ELECT TO DISPENSE WITH A LAWYER'S HELP AND CONDUCT HIS OWN CAUSE PRO SE AND THIS MEANS THAT THE ACCUSED MUST BE ACCORDED AN OPPORTUNITY TO EFFECTIVELY EXERCISE THIS RIGHT.

The United States Supreme Court and the Courts of Appeal of the various circuits have considered a variety of claims by an accused that his trial was had in violation of one or more of the express provisions of the United States Constitution. In reviewing these decisions one is immediately impressed with the thorough and probing examination that these courts have patiently and consistently given each claim, many of which are patently frivolous. If there be a single principle that any one of the decisions could be cited as establishing it is that these United States courts have a fastidious regard for justice administered in conformity with these fundamental constitutional safeguards .

CHAPTER II

The first part of the book is devoted to a general survey of the history of the world, from the beginning of time to the present day. The author discusses the various stages of human civilization, from the earliest times to the present day, and the progress of the human race. He also discusses the various religions and philosophies of the world, and the influence of these on the human mind.

The second part of the book is devoted to a detailed account of the history of the world, from the beginning of time to the present day. The author discusses the various stages of human civilization, from the earliest times to the present day, and the progress of the human race. He also discusses the various religions and philosophies of the world, and the influence of these on the human mind.

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Appellant claims his trial was had in violation of one of the seven fundamental safeguards contained in the Sixth Amendment, which provides inter alia:

"in all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense. "
(emphasis added)

According to the decisions of the United States Supreme Court, Courts of Appeal and Congressional enactments, this constitutional safeguard means:

1. That the right to assistance of counsel means the right to effective assistance of competent counsel and the accused must be afforded a reasonable opportunity to preserve this right at all stages of the proceedings.
2. This right the accused, at his election, is absolutely privileged to freely exercise either in person acting as his own counsel, or by an attorney of his choice, or if unable to obtain an attorney the court must assign counsel to assist him.
3. Upon request the accused must be given an opportunity to make a free choice whether he will select his own counsel or whether he will elect to exercise his constitutional right in person.
4. If the accused is denied an opportunity to exercise a free choice in the exercise of any of his alternative rights, or if he is prevented from effectively exercising one of the rights, the court is without jurisdiction to convict.

The leading case which has been followed by all subsequent cases construing the Sixth Amendment is Johnson v. Zerbst, 304 U. S. 458, decided in 1938. In that case the Supreme Court on habeas corpus set aside a conviction where the accused was not provided counsel and there was no intelligent waiver. The court held that compliance with the constitutional mandate was an essential requisite to the court's jurisdiction.

The freedom of choice accorded the accused in the exercise of the right to counsel under the Sixth Amendment is specifically illustrated by Wolleck v. Hudspeth, (1942, C. A. 10th), 128 F. 2d 343, and United States v. Bergamo, (C. A. 3rd, 1946), 154 F. 2d 31. In Wolleck v. Hudspeth, supra, the defendant on the day of trial advised the court he wanted to employ an attorney. The court offered to appoint counsel for him on the condition that the trial proceed at once. The defendant declined and he was tried without counsel. The conviction was set aside by the Court of Appeals, holding that the defendant had the right to select counsel of his own choosing and that the court's offer to appoint counsel on condition trial proceed at once was in effect a denial of counsel.

In United States v. Bergamo, supra, defendants, residents of New Jersey, were indicted in Pennsylvania. They retained a New Jersey lawyer to represent them and also a Pennsylvania lawyer to serve in a more limited capacity. The court refused to permit the New Jersey lawyer to participate because he was not admitted to practice in the State of Pennsylvania. The Pennsylvania lawyer had been in the case

more than three weeks prior to trial and although he conducted the trial he was assisted in the courtroom by the lawyer from New Jersey. The Court of Appeals reversed, stating at page 35:

"Under the circumstances the defendants were deprived of the advice of counsel of their own choosing. . .

"Nor was their representation effective. Since they were deprived of a constitutional right the judgment of conviction pronounced by the court was void."

The United States during its last term (October 1955 Term) rendered two decisions significant in that they point up clearly that the court distinguishes between those cases where there has been an opportunity afforded for the exercise of constitutional rights, and those cases in which no opportunity has been afforded. The two cases are Michel v. State of Louisiana, 350 U. S. 91, 76 S. Ct. 158, decided December 5, 1955; and Reece v. State of Georgia, 350 U. S. 85, 76 S. Ct. 168, decided on the same day. In both cases the defendants were convicted in state courts after having been indicted by the grand juries in those respective states. In each case, each of the defendants were indicted and convicted for the crime of rape and sentenced to death. The states, Louisiana and Georgia, respectively, each had procedural laws strictly limiting the time within which any defendant could file a motion to challenge the legality of the composition of the grand jury on account of race discrimination.

In the first case, Michel v. State of Louisiana, supra, the defendant Michel was appointed counsel three days prior to the expiration of the time for filing the motion. The Supreme Court affirmed the conviction holding that the fact that appointed counsel failed to file a timely motion did not overcome presumption of effectiveness of representation. The Chief Justice, Mr. Justice Black and Mr. Justice Douglas dissented.

In the Reece case the defendant likewise failed to file a timely motion, but in this case the defendant was not provided counsel until the day after the time had expired. Here the court reversed stating:

"The effective assistance of counsel in such a case is a constitutional requirement of due process which no member of the union may disregard. . .

". . . In the present case the right to object to a grand jury presupposes an opportunity to exercise that right."

In the one case, i. e. , Reece, there was no opportunity to exercise the right because of belated appointment of counsel. In the other, i. e. , Michel, counsel was appointed but through lack of diligence failed to exercise the right.

2. THE PROVISION OF THE SIXTH AMENDMENT THAT THE ACCUSED SHALL ENJOY THE RIGHT TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE INCLUDES THE CORRELATIVE RIGHT TO DISPENSE WITH A LAWYER'S HELP AND PROCEED ALONE, AND THE ACCUSED HAS FREEDOM OF CHOICE IN SELECTING THE MOST EFFECTIVE MEANS FOR PRESENTING HIS CASE IN COURT.

The absolute right of an accused to elect to appear as his own counsel is established by statute as well as judicial decision. 28 U. S. C. A. , Sec. 1654 provides:

"In all courts of the United States the parties may plead and conduct their own cases personally or by counsel, as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein. As amended May 24, 1949, C. 139, Sec. 91, 63 Stats. 103." (emphasis added)

Rule 44 of the Federal Rules of Criminal Procedure provides:

"If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him in every stage of the proceeding unless he elects to proceed without counsel, or is able to obtain counsel." (emphasis added.)

This rule became effective March 21, 1946, and stems from the language of the Supreme Court of the United States defining the right to counsel under the Sixth Amendment in Johnson v. Zerbst, supra, and subsequent decisions.

The leading case on the right of an accused to personally exercise the functions of counsel was Adams vs. U. S., 317 U. S. 269. In this case the defendant elected to conduct his own defense, and was afforded full opportunity to do so. He waived a jury and was convicted. The Court of Appeals reversed holding an accused without independent counsel could not waive a jury. The Supreme Court reversed the decision of the Court of Appeals and affirmed the conviction holding that the right to dispense with a lawyer's help and proceed as one's own counsel was not a mere legal formalism, but was correlative to the right to assistance of counsel under the Sixth Amendment, and that an accused who is competent and knows what he is doing is entitled to exercise a free choice in the matter.

The decisions of the several Courts of Appeal have without exception recognized the rights of an accused, under the Constitution, to conduct his own case pro se, among which are United States v. Cantor, 217 F. 2d. 536, (C. A. 2d. 1954), United States v. Shelton, (C. A. 5th, 1953), 205 F. 2d 806, and United States v. Mitchell, 137 F. 2d 1006, and 138 F. 2d 836.

In United States v. Cantor, supra, the defendant at his election was accorded full opportunity to conduct his own defense. Nonetheless, the trial judge in an

apparent effort to make certain that the defendant enjoyed the full exercise of his right assigned counsel to give whatever assistance the defendant would permit. The defendant conducted his own defense without restriction, including addressing the jury in opening, and the assigned attorney gave whatever assistance that the defendant requested. On appeal the defendant complained of a remark made by the attorney in the presence of the jury that he had been assigned without fee. The Court of Appeals affirmed concluding that the defendant was not deprived of his right to try his case. The court stated at page 538:

" . . . the right of an accused to conduct his own defense without counsel is clear. (citing cases) In this instance a middle course was taken in that defendant was not deprived of his right to act as his own trial lawyer, but was never the less, not permitted to try his case without some participation by assigned counsel. Assuming that he declined such assistance with his eyes open there was some curtailment of his right to proceed alone and if any prejudice to the appellant was the result of that the judgment should be reversed."

In the case of Shelton v. United States, supra, (cited by Appellee at page 53) the defendant elected to, and did, fully represent himself, but requested that the court appoint counsel to advise him during the trial. The court refused, stating that defendant was either going to be represented by counsel or was going to represent himself and that the court would not appoint a lawyer and have him occupy an inferior position in the conduct of the case. On appeal the

defendant contended that 28 U. S. C. 1654, which stated the rights in the alternative, was unconstitutional and that he had the right to have counsel assigned to advise him while he conducted his own case. The Court of Appeals affirmed.

RATIO DECIDENDI: Under the Sixth Amendment the accused shall enjoy the right to have the assistance of counsel and shall enjoy the relative right to dispense with a lawyer's aid and proceed alone.

In order to conclude that Shelton was deprived of any constitutional right by refusal of the court to assign counsel on demand necessarily means that Shelton in defending himself was exercising the alternative guaranteed him under the Sixth Amendment.

In Craig v. United States, 217 F. 2d. 355, two defendants were jointly charged and employed the same attorney who appeared and represented them throughout the trial without any indication of dissent from either defendant. After conviction defendant Craig contended that a conflict of interest prevented effective cross-examination of a witness. The court reversed the judgment on the ground that the conflict in fact appeared and therefore Craig had been deprived of effective assistance of counsel. The court stated at page 355:

"The prejudice to a defendant from the failure to have the effective assistance of counsel results whether counsel is court appointed or selected by the accused . . ."

"Craig was in no way deprived of his right to independent counsel of his own choosing by

"any act of the District Judge or District Attorney; nevertheless, by reason of a combination of circumstances, not reasonably foreseeable by court or counsel he did not receive the effective assistance of counsel to which he was entitled under the Sixth Amendment. . ."

That the right to counsel means effective assistance of competent counsel was established in the case of Glasser v. United States, (1942) 315 U. S. 60, 86 L. Ed. 680, 62 S. Ct. 457. The Court, holding that assistance of counsel meant effective assistance and the error of the trial court in requiring defendant's counsel, over his objection to represent a co-defendant, required that judgment be set aside. The court went on to hold specifically that irrespective of any possible conflict of interest the defendant had the right to insist that the court abstain from imposing any additional burdens on his counsel that might impair effectiveness, and that the right to counsel was "too fundamental and absolute to permit any nice calculations concerning the amount of prejudice arising from its denial."

In United States vs. Mitchell, *supra*, the court held:

"Presumably if an accused during the trial decides that he wishes to proceed alone and without delaying the trial, and makes his decision with full knowledge of the risks he is taking . . . that course should be open to him, in view of the fact that he must have complete confidence in his counsel. . ."(Emphasis added)

In United States v. Dennis (C. A. 2d. 1950), 183 F. 2d. 201 (appeal from the decision of the District Court case of United States v. Foster, 9 F. R. D. 367) the defendant, at the end of a nine month trial made what the court deemed a colorable attempt to discharge his attorney. After extensive findings concluding that the defendant and his attorney were in bad faith the request was denied. The Court of Appeals affirmed stating:

"True, one has an absolute privilege of doing without any attorney, if one wishes, but that is quite different from the privilege of discharging him without any substantial reason at the very conclusion of the case."
(Emphasis added)

In Mitchell and Dennis the defendants were not attempting to exercise any constitutional right. One (Mitchell) was merely creating a disturbance and the other was seeking an opportunity to do so. However, the decisions both recognize the right of an accused to proceed alone. That the court would protect to the fullest any good faith attempt to actually exercise the right is demonstrated by the decision of that same court in the Cantor case, (supra).

Although Craig and Glasser establish the principle that the right to counsel means effective counsel another principle inherent in the decisions is significant.

In Craig, the court broadened the established principle that exercise of a constitutional right presupposes an opportunity for its exercise. Craig was

permitted to raise a claim of ineffective counsel after the trial when it was made to appear that he didn't acquire knowledge of the fact which gave rise to the complaint until that time. Therefore, it would follow that if Craig at any time during the trial had discovered the fact he would be entitled to absolutely discharge his counsel. Failure to grant such a request would necessarily compel reversal.

Thus, the right that is being protected is effective assistance of counsel and when the fact of ineffectiveness is made to appear a reversal will follow. Thus, considering Mitchell, Dennis and Craig it would appear any time the accused presents in good faith a substantial reason for either proceeding alone, or for discharging or changing counsel, and it appears that failure to grant the request is likely to impair or destroy the effectiveness of counsel, then the request must be granted.

This principle is solidified by Glasser vs. United States, supra. There the Supreme Court having concluded that the Sixth Amendment contemplated effective assistance of counsel, held it was Glasser's right to determine in what manner he could obtain the most effective representation. Thus, Glasser, having decided that divided assistance would impair the effectiveness of his counsel, he was justified in requesting that a procedure be adhered to which would in his judgment preserve his right.

At the beginning of this topic we listed what we contended were four legal principles, each of which is included in the Sixth Amendment as correlative to or one of the incidents of the right to assistance of counsel.

It is respectfully submitted that the foregoing authorities firmly established each of those principles. All of the decisions emphasize the unqualified protection afforded the freedom of choice by an accused in exercise of his rights under the Sixth Amendment. Implicit is the concept that an accused fully advised, and not incompetent, is capable of making an intelligent choice in his own best interest, provided he is afforded sufficient opportunity.

Thus, in the cases of Johnson v. Zerbst and Reece v. Georgia, *supra*, the court concluded that an accused not advised and therefore devoid of knowledge of his rights had no opportunity for a free exercise thereof. In the cases of Wolleck v. Hudspeth, and United States v. Gergamo, *supra*, the courts set aside the convictions because the action of the trial court had restricted the defendants' freedom of choice in selecting counsel.

That right to conduct one's own cause in person was absolutely guaranteed by the Sixth Amendment was unquestioned after Adams v. United States, Shelton v. United States and Cantor v. United States, *supra*. The Constitution guarantees the accused unfettered opportunity to make a free choice -- but does not guarantee that the choice will be a wise one or that it will be exercised. In this matter the accused has the fundamental right to be wrong.

See also Collins v. Heinz, 125 F. Supp. 186; Kuczynski v. U. S. 149 F. 2d 478 C. A. 7th (1945); U. S. vs. Gutterman, 147 F. 2d. 540, C.A. 2d. (1945); Collins v. Heinz, 217 F. 2d. 62 (9th Cir. 1954) affirming the decision of the District Court cited above.

B. THE TRIAL COURT PREVENTED APPELLANT FROM CONDUCTING HIS OWN CASE IN PROPRIA PERSONA AND INSTEAD AND OVER OBJECTION FORCED APPELLANT TO PROCEED TO TRIAL WITH A LAWYER ADMITTEDLY UNABLE TO GIVE APPELLANT ANY REPRESENTATION AT THE OUTSET.

On the day of trial Appellant was his own counsel, having at all prior proceedings appeared in propria persona, and at no time altered this status. On August 3rd, prior to selection of the jury, Appellant reiterated that he was representing himself, and sought permission to associate as co-counsel another attorney to assist him in a limited capacity. The court denied this request, and at the same time advised Appellant:

"You had better get yourself a lawyer of record, or if you are going to defend yourself bear in mind the rule . . . that those who give testimony cannot argue the case to the jury." (Tr. - 28)

Thus at the outset this Appellant had to decide which constitutional right he would forfeit. The right to sum up the favorable evidence in a case such as this was of utmost importance. Appellant knew then, and the record bears him out, that the principal question involved in the trial would be an appraisal of the credibility of the prosecution witnesses. This was a question solely for the jury. Considering the anticipated length of this trial, to deprive Appellant of the right to sum up at the conclusion of the case leaving him at that critical period without any counsel was

The first of these is the fact that the
theology of the Church of England is
not a fixed and unchanging system
but a living and growing one. It is
the result of the continuous work of
the Holy Spirit in the hearts of
the faithful, and it is the result of
the continuous work of the Church
in the world.

The second of these is the fact that
theology is not a purely academic
discipline. It is a discipline which
is concerned with the life of the
Church and the life of the world.
It is a discipline which is concerned
with the truth of God and the
truth of man. It is a discipline
which is concerned with the
relationship between God and man,
between the Church and the world,
between the living and the dead.

The third of these is the fact that
theology is not a purely speculative
discipline. It is a discipline which
is concerned with the practical life
of the Church and the practical life
of the world. It is a discipline
which is concerned with the
application of the truth of God
to the life of man, to the life of
the Church, to the life of the world.

The fourth of these is the fact that
theology is not a purely individual
discipline. It is a discipline which
is concerned with the collective life
of the Church and the collective life
of the world. It is a discipline
which is concerned with the
relationship between the individual
and the collective, between the
Church and the world, between the
living and the dead. It is a
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the truth of God and the truth of
man, with the relationship between
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and the world, between the living
and the dead.

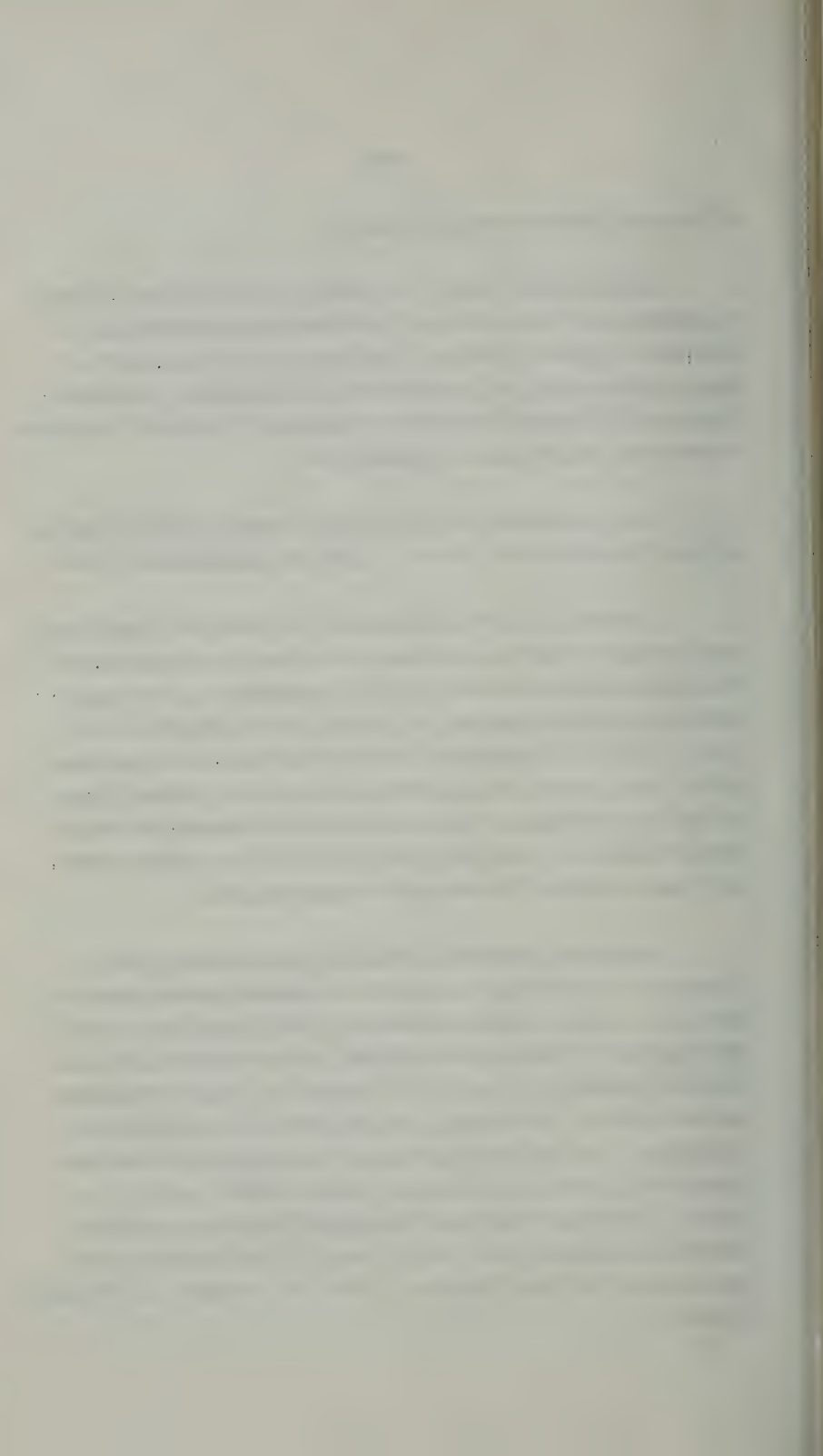
effectively destroying the right.

On the other hand, in order to be able properly to defend and exercise all the functions incidental to effective representation Appellant was required to give up the right to be heard in his defense, and thus leave unchallenged whatever charges, however flagrant, witnesses might make against him.

Yet, Appellee with apparent candor said this Appellant was given a choice. (Br. of Appellee, p. 46)

The only other alternative left open to Appellant was to substitute an attorney who knew nothing about the case and therefore would be unable to give Appellant any representation, at least at the outset of the trial. Either alternative effectively placed Appellant in the position of being without counsel at some phase of the proceedings. Appellant had no choice but was compelled to do just what he did, and that was to effect some kind of reasonable compromise.

Assuming arguendo that all proceedings with respect to appearing as his own counsel terminated at this point, and further assuming that Appellant substituted Mr. Fitzgerald without further objection, and further assuming that Mr. Fitzgerald, fully prepared on the law and the facts, had effectively represented Appellant, we believe that under the principle before discussed, even this state of facts would compel reversal. For not only was the right to a free choice denied this Appellant, but he was not afforded a real opportunity for any choice. (See "A" under this Topic, supra)



Appellant does not take the position here that this particular ruling is to be isolated and treated separately. The entire proceedings from 10:00 A.M. August 3rd to 10:00 A.M. August 4th constitute a single concentrated attempt on the part of this appellant to maintain the status that he held when he came into court on August 3rd, and that is as his own counsel.

This Appellant's right to continue in propria persona was seriously impaired by the initial ruling. At the end of these proceedings just prior to the commencement of the trial in the presence of the jury the right was completely destroyed. During the intervening period this Appellant at every reasonable opportunity reasserted his intention and hope that he would be permitted to conduct his own case.

Appellant attempted to find some reasonable basis with which to compromise. He began by requesting permission to argue motions of law. When Appellant obtained that concession Appellant then sought leave to be permitted to examine witnesses. It was at this point the trial judge said the matter would have to be settled on principles of law, and that since no question would arise that day he would announce his ruling the following morning. (Tr. - 34) The matter having been held in abeyance, Mr. Fitzgerald suggested Appellant move that he be made attorney of record. Appellant, endeavoring to keep his status, was careful to move Fitzgerald's association as co-counsel. (36-A-2) That afternoon Appellant again explained in detail the reasons for the necessity of being permitted to conduct his own case.

"MR. DUKE: -- I was going to appear as my

"own counsel in the case. That is still my full intention.

"Merely because I see some awkward situations arising and saw some awkward situations arising, and in order to make it a more orderly hearing, I accepted Mr. Fitzgerald's offer to come in and assist over those awkward situations. (Tr. p. 36-A-164: & 170)

"I prepared the case myself, and Mr. Fitzgerald has not prepared it, and I had prepared the case to defend myself.

"Because of the matters that your Honor brought up this morning, I agreed I wouldn't even argue to the jury at the end of the case, argue the evidence to the jury."

"MR. DUKE: At the beginning, there has not been sufficient time, and I came down here today fully intending to maintain the same official status I had at all times maintained in this case, and that is as my own counsel..."

"I feel that I must, at the outset, participate in this case, and I will assure your Honor I will make my participation, as to my own interest, as little as possible and still consistent with defending myself."

The following morning the court announced its final ruling in effect directing that Mr. Fitzgerald proceed to trial in charge of Appellant's case with Appellant being permitted to participate to a very

limited extent.

Appellant, under the ruling not being able to open his case before the jury, elected to forfeit his right to finally argue in order to have effective representation at the outset of the trial. Appellant announced his election, asking the court if he would not be permitted to take charge of his case if Mr. Fitzgerald withdrew. The court refused to permit Mr. Fitzgerald to withdraw on the grounds that Appellant had moved the day before that he be made his attorney, although Appellant explained that he was prepared and Mr. Fitzgerald was not, that he had moved that Mr. Fitzgerald be associated as co-counsel, and again explained his reasons. Appellant then made a formal motion that the court release Mr. Fitzgerald, which motion the court denied and the trial commenced.

"MR. DUKE: I only want to make an opening statement because I alone am prepared --"

"THE COURT: That is your misfortune, Mr. Duke."

"MR. DUKE: If Mr. Fitzgerald withdrew from the case I would be permitted to proceed in proper?"

"THE COURT: I am not going to permit him to withdraw at this time. You started out with him and you are going to have to live with the fact you have an attorney here, Mr. Duke."

"MR. DUKE: I didn't start out with him."

"THE COURT: Well, so far as these proceedings that commenced yesterday are concerned, you did. Didn't you move that he be made your attorney here?"

"MR. DUKE: I moved he be associated as co-counsel."

"I have appeared at all times for myself and have made it plain to the United States Attorney and to the court at all times that I intended to represent myself in this matter."

"MR. DUKE: I don't know whether I formally moved or not. I do at this time formally move the court to allow Mr. Fitzgerald to be released."

"THE COURT: Denied."
(All emphasis added)

Thus appellant, charged with ten felonies, including three separate conspiracies, was forced to commence a seven week trial represented by an attorney who admittedly knew nothing about the case.

In Adams v. U. S., (1952) 317 U. S. 269, 279, the Supreme Court stated at page 279:

"An accused must have the means of presenting his best defense. He must have time and facilities for investigation and for the production of evidence. But evidence and

"truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in Court. But the Constitution does not force a lawyer upon a defendant."

Appellant did have the absolute right under the Constitution to elect to defend himself without the assistance of any counsel. We submit that on the record of the proceedings prior to the commencement of the trial in the presence of the jury that this Appellant earnestly and sincerely attempted to exercise that right. The final order of the trial court denied to this appellant his right to conduct his own cause in the manner that he deemed to his best advantage. It would be impossible to know whether this appellant would have managed his cause any more effectively for the obvious reason he was not permitted to do so. In Tanksley v. U. S., 145 F. 2d 58 (C. A. 9th, 1944) this court held: (re right to public trial)

"A violation of the constitutional right necessarily implied prejudice and more than that need not appear. Furthermore, it would be difficult if not impossible in such cases for a defendant to point to any definite personal injury. To require him to do so would impair or destroy the safeguard."

In U. S. v. Kobli, 172 F. 2d 919, (C. A. 3rd 1949) the court stated at page 924:

"We are duty bound to preserve the right (public trial) as it has been handed down to us and this we will do only if we make sure

"that it is enforced in every criminal case, even in such a sordid case as the one now before us. (emphasis added.)

Although as we have pointed out in our discussion of the authorities at page 10-23 supra, in this area the trial court has no discretion and if this Appellant had the right under the Constitution to choose to defend either in person or by counsel, then the court lost jurisdiction and there is no need to point to any prejudice. However, could there be any greater prejudice to an accused charged with ten felonies than to be compelled to shop for counsel among the lawyers for his co-defendants a bare five minutes prior to the time the jury commences hearing evidence against him?

If the Government cannot convict Appellant in a trial in which he is effectively represented, then he should not be convicted.

We have attempted in the beginning of this topic to point out the legal principles which we think are applicable here. We believe that the authorities discussed establish without question those principles. It is submitted that the facts uncontradicted in the proceedings of August 3rd and August 4th compel the reversal of this judgment when the legal principles and facts are considered together.

Respectfully submitted,

BARTON C. SHEELA, JR.
GOERGE W. RUTHERFORD
CLINTON F. JONES
WESLEY B. BUTTERMORE
Attorneys for Appellant

APPENDIX

APPENDIX
TO REPLY BRIEF

PROCEEDINGS OF AUGUST 3, 1955
PRIOR TO SELECTION OF JURY

EXCERPTS FROM RECORD

(Tr. p. 27)

"MR. BOWLER: May I make this observation. I notice Mr. Duke is here, represented by counsel. He has made several observations in this chambers meeting here. ."

(Tr. p. 28)

"THE COURT: . . . if Mr. Duke is represented by counsel here, then Mr. Duke should speak to the court through counsel,

"except when he gives evidence . . ."

"MR. DUKE: I am representing myself, your Honor, associating Mr. Fitzgerald."

"THE COURT: You can't do that. Is Mr. Fitzgerald of record?"

"MR. DUKE: No, your Honor."

"THE COURT: You had better get yourself a lawyer of record, or if you are going to defend yourself, bear in mind the rule. Now, I don't know how firm a rule it is, but it is a rule that those who give testimony cannot argue the case to the jury. And if you intend to testify, bear in mind that there are rules which would prevent your arguing the case to the jury, if you do that. If you want Mr. Fitzgerald to be your attorney, get him of record. If he is of record you cannot act in pro per or as an attorney with him."

"MR. FITZGERALD: Cannot be associated with him, in other words?"

(Tr. p. 29)

"THE COURT: No."

"MR. DUKE: I brought Mr. Fitzgerald here out of an abundance of kindness on his part, your Honor, to do those things which I knew the rules would preclude myself from doing.

"That being the case, Mr. Fitzgerald has

"agreed to come down and assist in those matters which would, I think, make it less awkward in the courtroom. But I have appeared for myself at all times here, and I would, like one of the other defendants, have two counsel. And if I may be permitted to act in that dual capacity and participate -- "

"THE COURT: What law allows it?"

"MR. FITZGERALD: Well, I guess the law entitles counsel to associate anybody he wants . . .

"He knows this case . . . And I am coming here to assist when he cannot with propriety do the job himself . . ."

(Tr. P. 31)

"THE COURT: . . . for Mr. Duke to undertake to examine witnesses or to argue motions or evidence, I think, is very unwise from the standpoint of Mr. Duke himself, from the standpoint of your having adequate control of his case, and from the standpoint of an orderly procedure here."

(Tr. p. 34)

". . . Gentlemen, it appears to me that so far as I can decide that matter, it must be decided on principles of law rather than upon principles of whether it is wise for Mr. Duke or pleasant for the litigants and other lawyers and witnesses.

" . . . I don't know at the moment whether I can restrict Mr. Duke and Mr. Fitzgerald, from having Mr. Duke participate in the examination of witnesses. If I can I will, because I don't think he should do it. . . "

"Can the prosecution give me the benefit of some research on that?"

"MR. BOWLER: I assume there will be no question arise in today's proceedings, if we are interrogating the jury. "

"MR. FITZGERALD: No. "

"THE COURT: We will not take any evidence today. "

"MR. BOWLER: We will present whatever authority we can. "

"MR. DUKE: I might say, your Honor, I would expect, if I am permitted to do that, that your Honor would give me the same treatment that you would give any counsel, and if I overstep the bounds, forget I am a defendant for the moment and stop me and overrule me and censure me sharply in court, because, I assure you, I believe I can contain my emotions and assume a dual role in that respect and will seriously endeavor to do so. And certainly will not take any exception whatever to any objections or any serious rebuke from the court if I overstep my bounds. "

"THE COURT: This conference in chambers is now ended, and we will take up in court at 10:30."

(Tr. p. 36-A-1)

(Whereupon the following proceedings were had in the presence but out of the hearing of the venire:)

Tr. p. 36-A-2)

"MR. FITZGERALD: Now the record does not show my association as counsel of record.

"Would you make that motion now, so that I am officially associated?"

"MR. DUKE: I move that Mr. Clifford K. Fitzgerald, with offices at 406 United States National Bank Building, San Diego 1, California, an attorney licensed to practice law in the State of California and admitted to practice in this court, be associated as my co-counsel in this case."

"THE COURT: I don't know whether you can associate him and remain both defendant and an attorney. I think you have to do one or the other, either defend yourself and not argue the case, if you take the stand and testify, or substitute an attorney.

"But, for reasons which were gone into in chambers, I will allow Mr. Fitzgerald to be associated with the understanding that he is to conduct the case, except argument of

'motions upon matters of law . . .

"I will keep under submission whether you may examine witnesses until tomorrow . . ."

CONFERENCE AFTER ADJOURNMENT
ON AUGUST 3rd, 1955
EXCERPTS FROM RECORD

(Tr. p. 36-A-160)

"MR. FITZGERALD: The court please, I asked for the conference. It is in regard to this order to interview a witness.

"Counsel for the Government has prepared the order, which provides that the witnesses be interviewed by Richard Vaughn, Edgar G. Langford, attorneys for Vic Buono, and Thomas Whelan, attorney for Ballard, and by myself as attorney for the defendant Duke.

"The order is not agreeable to the defendant Duke because of the fact I have recently come into this case and do not know what can be developed from these witnesses.

"He feels that he is thoroughly familiar with it and desires to attend the interview and participate in the interview."

"THE COURT: What is the objection to his doing so?"

"MR. STEWARD: Well, Judge, we might as

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"He feels that he is thoroughly familiar with it and desires to attend the interview and participate in the interview."

"THE COURT: What is the objection to his doing so?"

"MR. STEWARD: Well, Judge, we might as

"well face this issue right now, as to what his participation will be during the course of trial . . ."

"THE COURT: . . . you had indicated this morning a willingness to let the defense examine these witnesses . . ."

". . . What is the objection to Mr. Duke participating in the interview? . . ."

"MR. STEWARD: Your Honor, for the exact same reason the court earlier today indicated, the possibilities of the argumentative type of questions that you yourself brought out . . ."

(Tr. p. 36-A-164)

"MR. FITZGERALD: . . . My predicament is this: Mr. Duke can't even attend the conference, the way this order is drawn. And I am going to examine Todd and this Spicuzza, and there may be some matters I should ask him about, and I wouldn't even know anything about it. . ."

"MR. DUKE: I am not going to start any commotion. Last week here I was -- and everybody was under full agreement -- I was going to appear as my own counsel in the case. That is still my full intention.

"Merely because I see some awkward situations arising and saw some awkward situations arising, and in order to make it a more orderly hearing, I accepted Mr. Fitzgerald's

"offer to come in and assist over those awkward situations.

"I prepared the case myself, and Mr. Fitzgerald has not prepared it, and I had prepared the case to defend myself.

"Because of the matters that your Honor brought up this morning, I agreed I wouldn't even argue to the jury at the end of the case, argue the evidence to the jury. I would leave that to Mr. Fitzgerald, because, sitting through the trial, by that time I know he would certainly have a better grasp of it, even, than I would.

"At the beginning, there has not been sufficient time, and I came down here today fully intending to maintain the same official status I had at all times maintained in this case, and that is as my own counsel . . ."

(Tr. p. 36-A-166)

"But I haven't prepared this case and didn't come here today prepared for Mr. Fitzgerald to go into this thing fully. I think in a few days time he will certainly be able to do it.

"I realize the hazards in it. I realize the old admonition that the lawyer that represents himself has a fool for a client. . ."

(Tr. p. 36-A-168)

"MR. FITZGERALD: Can my associate

"come with me to this conference and ask the questions he wants to ask, or at least, be present and suggest them to me?"

(Tr. p. 36-A-170)

"THE COURT: . . . Upon the present showing the motion is denied."

"MR. DUKE: Your Honor, while we are here, may we clarify my status?"

"In arguing this particular point, I think I stated my position and there is no need for me to argue it again.

"I feel that I must, at the outset, participate in this case, and I will assure your Honor I will make my participation, as to my own interest, as little as possible and still consistent with defending myself.

"THE COURT: I think you are either your attorney or Mr. Fitzgerald is your attorney, and that you can't ride both horses, that is, be a man in pro. per. and a man with an attorney, too.

"However, in view of the difficulty which your attorneys say you have, due to the fact, apparently that you let this go until the last minute before getting ready for the trial, to the extent of having an attorney well briefed on it, I will let you ask questions of witnesses."

(Tr. p. 36-A-171)

". . . I can see where you are in a bit of a

"difficult position, which it appears, is due to neglect of this case. . ."

"MR. DUKE: Your Honor, I intend to and have at all times intended to appear as my own counsel."

"THE COURT: I have given you permission within limits to do so."

PROCEEDINGS ON MORNING OF
AUGUST 4, 1955, 10:00 A.M.
PRIOR TO COMMENCEMENT OF TRIAL
IN PRESENCE OF JURY

(Tr. p. 39)

"THE COURT: Now, that there be no confusion about the participation of Mr. Duke, I think I indicated in yesterday's session that Mr. Duke is either under an obligation to appear in pro per or to be represented by counsel, but that a hybrid of the two is something to which he does not have a right, as a matter of right."

"The cases to which I have had access since that matter was presented to me yesterday bear that out. It is the court's understanding that Mr. Fitzgerald will make all arguments of fact and the opening statement to the jury on behalf of Mr. Duke, and Mr. Duke's participation in the trial, except as he will participate as a defendant and as a witness, if he so chooses, will be that he will be here as a defendant. He may be a witness, if he so

"elects, and the court will permit him to participate in the cross-examination of witnesses or in the direct examination of witnesses to the extent that we will continue to recognize the rule that there shall be but one counsel for a side or a party as to any one witness. "

(Tr. p. 42)

". . . if we get into argumentative examination of witnesses, the sort of thing that a defendant's natural interest in the case will tempt him to do, then I will not permit further examination of witnesses by Mr. Duke. As long as the examination conducted by Mr. Duke remains entirely an examination, free from argument, then Mr. Duke may participate in the examination to the extent the court has indicated. "

"MR. DUKE: If it please the court, for the record, may I note an exception to the court's ruling to the extent I cannot make an opening statement on my own behalf. I indicated --"

(Tr. p. 42)

"THE COURT: . . . I understand you want to make an opening statement, you want to argue the case. "

"MR. DUKE: No, I do not want to argue the case, your Honor.

"THE COURT: You can't make an opening statement, either.

"MR. DUKE: I only want to make an opening statement because I alone am prepared -- "

"THE COURT: That is your misfortune, Mr. Duke. You have been under indictment here for months, and to come to court with only yourself prepared, knowing the law or being trained to know it, is just something you are going to have to live with. Now, you get Mr. Fitzgerald educated as to the facts.

"I know academically you are educated, Mr Fitzgerald, but as to the facts, if you are not well prepared, you proceed last and I will see there is ample recess so that Mr. Duke can write it out, if he wants."

"MR. DUKE: If Mr. Fitzgerald withdrew from the case I would be permitted to proceed in proper?"

"THE COURT: I am not going to permit him to withdraw at this time. You started out with him and you are going to have to live with the fact you have an attorney here, Mr. Duke."

"MR. DUKE: I didn't start out with him."

"THE COURT: Well, so far as these proceedings that commenced yesterday are concerned, you did. Didn't you move that he be made your attorney here?"

"MR. DUKE: I moved he be associated as co-counsel. And I explained the reason for that was there were certain awkward situations that would arise when a person represents

"himself, and Mr. Fitzgerald had volunteered to come down and give me assistance, particularly in arguing to the jury and in examining myself when I took the witness stand. That is what I pointed out.

"I have appeared at all times for myself and have made it plain to the United States Attorney and to the court at all times that I intended to represent myself in this matter.

(Tr. p. 44)

"THE COURT: . . . when defendants represent themselves it is very difficult to maintain the type of conduct of a case which is best designed to produce a just result and an orderly presentation . . . because of the personal and emotional involvement of a defendant it is difficult.

"The Constitution says that you are entitled to representation by counsel of your choice. Inferentially, you may appear by the same authority and represent yourself. But you do one or the other. In fact, I think the Constitution says that the defendant may appear in person or by counsel. . .

"Now you have an attorney here, you are going to appear by the attorney. I will not release him unless something is brought to my attention beyond what is presently before me.

"I will relax in discretion, I will relax the rule about participation to the extent that you may cross-examine if it is done within the

-n-

"limits which the court has indicated.

"To all this an exception by Mr. Duke is noted. "

"MR. DUKE: I don't know whether I formally moved or not. I do at this time formally move the court to allow Mr. Fitzgerald to be released. "

"THE COURT: Denied. "

(All emphasis added)

No. 15146

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLIFFORD L. DUKE, JR., LOUIS GLEN BALLARD, and VIC
BUONO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING ON BEHALF OF
APPELLANT, VIC BUONO.

EDGAR G. LANGFORD,
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No. 15146
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

CLIFFORD L. DUKE, JR., LOUIS GLEN BALLARD, and VIC
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vs.

UNITED STATES OF AMERICA,

Appellee.

**PETITION FOR REHEARING ON BEHALF OF
APPELLANT, VIC BUONO.**

*To the Honorable Albert Lee Stephens, Dal M. Lemmon,
and James Alger Fee, Circuit Judges of the United
States Court of Appeals for the Ninth Circuit:*

Appellant Vic Buono presents this, his petition for a
rehearing in the above entitled cause, and in support
thereof, respectfully shows:

Preliminary Statement.

Appellant Buono was charged in an indictment with
five counts of smuggling in violation of United States
Code, Title 18, Section 545, and two counts of conspiracy
of violation of United States Code, Title 18, Section 371.
He was acquitted of one count of conspiracy and two
counts of smuggling and was convicted of one count of

conspiracy and four counts of smuggling. He took an appeal from the judgment of conviction to this Honorable Court.

On his appeal Buono contended, and still contends, *inter alia*:

“Appellant Buono could not lawfully be indicted for nor convicted of the conspiracy purportedly charged in count seven of the indictment, in view of the failure of the Government to allege or prove facts which would support a conclusion that such purported conspiracy had any existence separate from the conspiracy charged in count four.” (Appellant Buono’s Op. Br. p. 14.)

No purpose would be served in setting out or summarizing at this point the arguments of appellant Buono in support of this contention. They are fully set forth in appellant Buono’s briefs. (Buono’s Op. Br. pp. 14-21, Buono’s Rep. Br. pp. 4-8.)

As against the foregoing contention of appellant Buono, the Government took the position that there were two separate conspiracies. (Appellee’s Br. p. 113.)

This Honorable Court affirmed appellant Buono’s conviction. The reasoning of this Honorable Court with regard to the foregoing contention of appellant is set forth in two paragraphs on pages 8 and 9 of the opinion. It is conceded, at least for the sake of argument, that the evidence showed but one integrated conspiracy. However, the Court based its conclusion that there was no prejudicial error upon two premises:

1. When a single conspiracy consists of several phases involving different persons, it is proper to charge those in one phase with one conspiracy and to use a separate

count to charge as co-conspirators all those in another phase.

2. If count seven had been stricken, appellant Buono would have been convicted instead of acquitted on count four. This Honorable Court cites no authority whatever in support of the foregoing propositions. The Court has not had the benefit of argument of the parties, either oral or written, as to their merits. Furthermore, it is respectfully submitted that, for the reasons hereafter set forth, the foregoing propositions are unsound.

Ground for Petition for Rehearing.

I.

The conclusion of this Honorable Court that the trial and conviction of appellant Buono of the conspiracy charged in count seven of the indictment did not result in prejudicial error, based upon reasoning the merits of which were not argued by the parties on appeal, is unsound and should be reconsidered by this Honorable Court after a full argument on its merits.

Argument.

The reasoning of this Honorable Court as to the matter under discussion is set forth on pages 8 and 9 of the opinion. It consists of the two propositions set forth above. Neither of these premises is sound. We shall discuss the unsoundness of each in turn.

1. When a single conspiracy consists of several phases involving different persons, it is proper to charge those in one phase with one conspiracy and to use a separate count to charge as co-conspirators all those in another phase. On its face this proposition appears to offer

several practical advantages. It would seem to prevent any particular defendant from being prejudiced by the introduction of evidence which is irrelevant as to him. Furthermore, it should result in a saving of time. No doubt it is these factors which made it appear reasonable and desirable to this Honorable Court. However, closer examination of the proposition indicates that it is likely to raise more difficulties than it will solve.

We take it that the fact that a conspiracy may be divisible into "phases" does not change the application to it of the definition of conspiracy contained in the federal statutes. Thus, a person is guilty of but one crime of conspiracy whether he participates in one "phase" or several "phases" of a single conspiracy. If no individual on trial is charged with participation in more than one "phase," no difficulty is presented. However, where a defendant is charged with participation in more than one "phase," the charging in multiple counts will create more difficulty and confusion than it can possibly eliminate. In the case at bar appellant Buono was charged with participation in two "phases." If, as appears to be conceded, there was but one conspiracy in the case at bar, appellant Buono must necessarily have been prejudiced, had he been convicted of both count four and count seven. In such a situation one of the convictions would have had to be reversed or otherwise expunged. Furthermore, had appellant Buono received separate trials on counts four and seven, and had count four resulted in acquittal, as it did in the case at bar, that acquittal must clearly have been a bar to a prosecution on count seven, since count seven related to the same conspiracy as count four. The trial together of the different offenses charged in several counts of an indictment is a proced-

trial devise intended to increase the economy and efficiency of the courts. The proceedings are supposed to be handled in such a way that the defendant will have as fair a trial and the results will be no different than if he were tried on each count separately. Such a procedure certainly may not be used to deny to a defendant his fundamental constitutional right to be tried only once for a single offense. Yet, it is an inescapable practical fact that, had count seven been stricken as it should have been, or had the Government attempted to try appellant Buono on count seven after the acquittal on count four, appellant Buono could not have been convicted. It is obvious that when a defendant is convicted as a consequence of an error, but for which he could not have been convicted, then the defendant has been prejudiced by the error. This fact cannot be changed by all the logic, pure or otherwise, in the world.

2. If count seven had been stricken, the jury would have convicted appellant Buono of count four. This Honorable Court did not state this premise quite so explicitly as we have done. However, this is the upshot of the first paragraph on page 9 of the opinion. An explicit statement of the proposition should be sufficient refutation of it. Obviously, such a conclusion is usurpation of the province of the jury and beyond the power of this Honorable Court on appeal. Furthermore, it is incorrect.

The unlawful acts charged in counts four and seven were the same. Several persons were named as conspirators in both counts. The dates referred to in count seven, which of course were not binding upon the Government, were included within the time charged for

count four. Thus, all of the Government's evidence of conspiratorial activity by appellant Buono was admissible as to the charge in count four, as well as count seven. This Honorable Court may not properly conclude that the jury did not consider and reject all that evidence in connection with the charge in count four. To do so would be to presume error. Neither do we believe that it is the function of appellant Buono or of this Honorable Court to speculate as to the thinking of the jury. However, the conclusion of this Honorable Court is based in part upon such speculation. Therefore, we must offer our opinion as to the motivation of the jury in reaching its verdicts, for what bearing it may have upon the question of the prejudicial effect of the errors of the trial court.

We respectfully submit that the jurors did not believe the testimony of the admitted perjurers offered as witnesses by the Government. They did not rely upon such testimony for any of their verdicts. Appellant Duke was no doubt convicted because the jury was satisfied beyond a reasonable doubt from the manner of his conduct of his defense that he could not have associated for so long with the malodorous characters in the case without being guilty of the offenses charged in the indictment. They learned from reliable witnesses enough about appellant Ballard to reach the same conclusion as to him. However, the acquittal of appellant Buono on counts four, five and six indicates that the jury believed that appellant Buono could and did deal with the conspirators without becoming involved in their nefarious deeds.

There remains the question of why the jury convicted appellant Buono of count seven, and consequently of counts eight, nine and ten. In this connection it is obvious

What to have reached the result it did the jury must have somewhere drawn a line between count four and count seven. If, as is conceded, count four and count seven are merely different "phases" of the same conspiracy, then this line has no existence in the eyes of the law. The reasoning of this Honorable Court assumes that the jury has correctly drawn the line. We submit that on theoretical grounds it is impossible to correctly draw a nonexistent line. As a practical matter we submit that the line was not drawn so as to make count seven a complete conspiracy. Count seven was referred to throughout the trial as "the airplane conspiracy." In connection with this matter reliable evidence established and appellant Buono testified that he aided some of the smugglers in obtaining an airplane. Buono's version was that he did so in order to aid the smugglers in entering a legitimate occupation, so that he could be paid some of the money they owed him. The smugglers said that he was a party to a conspiracy to smuggle. It is almost inconceivable that the jury would have believed this testimony of the smugglers, while rejecting their testimony connecting Buono with count four. Under the instructions of the court the jury was bound to conclude that count seven related to some evidence presented by the prosecution which was separate and distinct from that offered under count four. In attempting to draw this line, which as a matter of law did not exist, they may well have hewed too close to count seven and, as a result, have convicted appellant Buono of aiding some smugglers in buying an airplane. So doing would not, of course, constitute conspiracy in the absence of an intent on Buono's part that the airplane should be used for smuggling. Such a conviction would be erroneous. It is an error which

could reasonably be expected to stem from the error of the trial court in permitting the case to go to the jury on count seven at all. If the jury did decide the case on this basis, the conclusion of this Honorable Court that they would have convicted on count four had count seven been stricken is clearly erroneous. Its further conclusion therefrom that appellant Buono was not prejudiced by permitting his case to go to the jury on both counts four and seven is, therefore, also erroneous. A rehearing should be granted in order that this Honorable Court may have an opportunity to reconsider and reverse its decision as to appellant Buono.

Conclusion.

This Honorable Court has concluded that the trial court did not commit prejudicial error as to appellant Buono. That conclusion is based upon reasoning as to the merits of which there was no argument by the parties on appeal. Furthermore, appellant Buono respectfully submits that that reasoning is unsound.

Wherefore, appellant Vic Buono respectfully prays that this Honorable Court grant him a rehearing and that upon said rehearing this Honorable Court reverse the judgment of his conviction.

Respectfully submitted,

EDGAR G. LANGFORD,

RICHARD L. VAUGHN,

J. PERRY LANGFORD,

By J. PERRY LANGFORD,

Attorneys for Appellant Vic Buono.

Certificate of Counsel.

J. Perry Langford hereby certifies that he is one of counsel for appellant Vic Buono in the above entitled matter; that the foregoing petition for rehearing is in his judgment well founded; and that it is not interposed merely for delay.

Dated, this 10th day of September, 1957.

J. PERRY LANGFORD.

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLIFFORD L. DUKE, JR.,
LOUIS GLEN BALLARD, and
VIC BUONO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING AFTER DECISION, BY
LOUIS GLEN BALLARD

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No. 15146

IN THE

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ARGUMENT

The opinion of the United States Court printed in the Advance Decisions indicates that the Appeal of Ballard was lost in a sordid story of intrigue, double dealing, and feuds among the Spiccuza and the Hadzimas. It is so clear that Ballard's Appeal was lost in a "package deal".

One has only to read the decision of the United States Court of Appeals in the above-entitled action to know that the Appeal of Ballard was not carefully considered and his points on appeal overlooked.

For example on Page 4 of the Advance Opinion of the Court it is said:

"Although Duke now attempts himself to escape therefrom, the trial of the case was permeated by his charge that the prosecution was the result of plot or conspiracy by certain public officials, in conjunction with organized labor, to frame Duke on the charges in the instant case. These statements and innuendos were made in the first instance by Duke himself and included, among those supposed to be assisting in the combination to frame him, a federal judge who tried a companion case and members of the staff of the United States Attorney conducting previous prosecutions as well as the prosecution of the instant case. The trial court took this whole situation into consideration in his rulings upon the question of representation. We see no reason why the trial court should have been compelled to allow Duke to turn this proceeding into a Roman holiday, WITH THE OTHER DEFENDANTS and government witnesses and the public officials AS THE VICTIMS. (Emphasis added). "

In arguing that Ballard's motion for severance should have been granted, Ballard's Reply Brief at

age 8, sets forth:

"Appellant Duke was quoted, from the record at the time of arraignment as saying that he had proof to show that certain individuals, including labor leaders and their attorneys, customs officers and members of the United States Attorney's office had entered into a conspiracy to obstruct justice by procuring false evidence to have him falsely indicted by the Grand Jury; that he wanted an early trial for the purpose of proving these matters.

These statements were made on June 3, 1955, in open court at the time of arraignment in Case No. 25276, the pending case and Case No. 25277 where Mr. Duke alone was a defendant (Appx. pp. 3-19).

After the making of these statements in open court before the Honorable Jacob Weinberger, Judge, everyone knew that there would be a dog fight, with the Government seeking to prove its charges and Appellant Duke seeking to prove that the charges were erroneously brought and by whom inspired.

Ballard filed his Notice of Motion to Move for a severance on June 15, 1955 (Appx. pp. 43-44). This motion for severance was heard and denied by the same Judge Weinberger, who had heard Mr. Duke's earlier statements (Appx. pp. 44 and 52-58)."

Neither lawyer nor Judge would have to be too astute to recognize the prejudice to any defendant on trial with Duke as codefendant after Mr. Duke's statement. Counsel for Ballard recognized it. Thus the motion for severance.

The United States Court of Appeals has by its opinion demonstrated the prejudice suffered by Ballard resulting from the denial of his motion for severance.

Moreover, it must be perfectly patent that the Jury felt as this Court did with reference to Mr. Duke, and the Jury with the comment of the Court before them allowed their feeling toward Duke to prejudice Ballard. Reference is made to Pages 27-28 Ballard's Opening Brief and a portion of the Reporter's Transcript Pages 3213 and 3214 where colloquy between Court and Counsel took place in the presence of the Jury:

"(The COURT): *** Now, Mr. Whelan, do you want to state a position for Mr. Ballard? Do you join with Mr. Duke or are you at odds with him, as Mr. Langford is?

"Mr. WHELAN: Your Honor please, I am not at odds with anyone. I think perhaps, as the evidence develops, there be some explanation as to why Ballard was included in this case.

"Naturally, I want to take advantage of any situation that does develop. I am not claiming anything particularly at this time, unless it is supported by the evidence.

"THE COURT: Your defense, insofar as

"I have observed here, is a defense of alibi.
'I wasn't present at the time.'

"MR. WHELAN: That is right, your Honor.

"THE COURT: And I suppose also that includes the defense, so far as the conspiracy is concerned, because conspiracy was over a considerable period of time when Ballard was present, at least, within the area in which the conspiracy supposedly operated.

"You haven't disputed that; that the defense is also, 'I did not do it.' "

(Rep. Tr., pp. 3213, l. 14 - 3214, l. 8)

It is significant to note that the statement of the court to counsel assumes a conspiracy "because conspiracy was over a considerable period of time when Ballard was present . . . ".

For the court to call upon Ballard to assume a position or a defense would be a denial of his constitutional rights in violation of the Fifth Amendment to the United States Constitution.

The decision of the United States Court of Appeals devotes four paragraphs to Ballard's separate appeal, as follows:

"Defendant Ballard was denied a bill of particulars because it was not clear who was actually to smuggle the birds into the United States and in what manner Ballard partici-

"pated in the conspiracy and the various acts. It is plain this was an attempt to have the evidence of the government disclosed before trial. The matter was in the discretion of the trial court, and this discretion was not abused.

It is likewise in the sound discretion of the trial judge to say whether defendants should be tried separately or together. Ballard was charged by one only of the ten counts. He claims he was prejudiced by denial of a motion for severance. The record shows there was nothing improper in trying all defendants together.

The court gave an instruction on alibi, at the request of counsel for Ballard. If there were any just criticism of the original instruction of the court as to alibi, it was thus corrected.

Evidence was admitted in rebuttal, which Ballard says was admissible in chief. This indicates there was no error. The trial court has discretion as to order of proof, and the evidence was admittedly competent. No prejudice was shown."

As to the first of the quoted paragraphs, this Honorable Court says: "no abuse of discretion"; as to the third, in effect "error corrected"; as to the fourth, "no prejudice shown".

As to the second quoted paragraph, this Honorable Court says: "The record shows there was nothing improper in trying all defendants together".

The record shows that the trial court felt that had a motion been made by Mr. Buono for a separate trial,

ne (trial court) would have granted such a motion. (Trans. of Record P. 469. Rep. Tr. 3213-3214) Ballard made a motion for severance addressed to Judge Weinberger who handled the calendar and all pre-trial proceedings.

The trial court evidently thought that neither Buono nor Ballard should have been put on trial with Duke.

The opinion of the United States Court of Appeals indicates the impropriety of trying all defendants together.

I

APPELLANT BALLARD AS ONE OF HIS PRINCIPAL GROUNDS OF APPEAL URGED THAT HIS TIMELY MOTION FOR SEVERANCE SHOULD HAVE BEEN GRANTED.

In addition to what is set forth in Argument, herenabove, the fact is that counts one to three of the indictment charged and the evidence tended to prove "a tremendous traffic in the smuggling of psittacine birds" antedating the events of May 13, 1953, the key date in counts four to six where Ballard was named a defendant. The charges contained in counts seven to ten involved and concerned the matters charged in counts four to six, and Ballard, not at all.

This Honorable Court makes no reference to:

Castellani vs. United States, 64 Fed. 2d 636, where that Court approved:

"It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried."

United States vs. Perlstein, 120 Fed. 2d 276 at 283, where the Court says:

"The extent of the prejudice to Paul which resulted from the joint trial cannot now be determined but became obvious in many rulings upon the evidence."

II

BALLARD ON APPEAL URGED THAT THE
DIGNITY OF THE UNITED STATES GOVERN-
MENT WILL NOT PERMIT THE CONVICTION
OF ANY PERSON ON TAINTED TESTIMONY

Ballard cited Mesarosh vs. United States of America, Vol 77, Sup. Court Rep. page 1 (Oct. Term 1956), Reply Brief, pages 3 and 4. This Honorable Court makes no reference to that case, but does observe:

"The testimony furnished by co-laborers in the vineyard, who were characterized by one of the defendants as:

'John W. Hadzima, a twice convicted smuggler, Nicholas A. Spicuzza, a twice convicted smuggler, George Todd, a twice

"convicted smuggler, Raymond Curtis, convicted smuggler, Robert Helm, convicted smuggler, Mary Asconi, admitted handler of psittacine birds known by her to have been smuggled. ' "

With the Mesarosh case in mind Ballard respectfully suggests in the interest of justice that this Honorable Court obtain from the U. S. Attorney a written report concerning the above-named Hadzima, Spicuzza, Todd, Helm, and Asconi and Curtis. Such a report the appellant believes and respectfully urges will show that since the trial in this case Hadzima has received a reduction of a prison sentence and forgiveness of a fine; that Spicuzza and Todd have received early paroles; that as to Helm a charge in violation of customs re-whiskey importation was dropped (this one different from the case referred to in the evidence in this case); that Curtis was never prosecuted; and that a charge against Asconi of smuggling psittacine birds (different from any incident in this trial) was dropped or that she received probation.

Counsel for Ballard has neither the inclination nor the facilities for checking these items out, but has full confidence in the integrity of the U. S. Attorney to correctly present these matters to this Honorable Court in writing; and counsel for Ballard will accept such written report from the U. S. Attorney unquestioned and unchallenged. In view of the testimony of these witnesses upon the trial of this case concerning lack of consideration to them for their testimony, an inquiry, in the light of the decision in Mesarosh, seems in order and if it appears the testimony of these witnesses was tainted testimony Ballard's conviction should not stand.

When Judge Fee (Page 9 Adv. Op.) writes "Humanitarian release on bail was capitalized by effecting new combinations and commission of other crimes" he could only be referring to the witnesses Hadzima, Spicuzza and Todd. The witnesses Helm and Curtis were, or had been, on probation for smuggling at the time of this participation.

Ballard was neither on probation nor on bail at the time of his alleged participation. Counsel for Ballard is not naive and will not conceal matters from this Court. Ballard had been sentenced to prison for crimes against State law - never Federal law, but had fully completed his sentences.

III

WAS THERE A FEDERAL OFFENSE

This latter statement points up the fact that this Honorable Court passed over Ballard's contention that the facts established no violation of Federal Law, but if the story of those delightful citizens Hadzima, Spicuzza, et al, was true, the crimes of robbery and assault with a deadly weapon, violations of State law, were made out - but no smuggling or conspiracy to smuggle.

Stripped of all non-essentials Ballard's conduct does not show a sordid story of intrigue, double-dealing and feuding. It does show a robbery, and a participation in a conspiracy to rob with his compensation a share of the proceeds of the loot.

CONCLUSION

Which is more important?

That Ballard be incarcerated in Federal Prison;

That every defendant accused of crime have the right to a trial on the facts of the case, on the charge that should be rightfully placed, with the protection of all the rights which the law affords.

In other words - Ballard can stand incarceration better than the cause of justice can stand a miscarriage of justice.

The opinion of this Honorable Court states:

"No record of any criminal case is so perfect that an astute lawyer can not suggest possibility of error."

Could it not be said that a reasonable, able, competent and thoroughly honest Judge might be swayed by circumstances as they appeared to him, to the point where he would write an opinion which would erroneously, though with complete honesty on the part of the Judge, deprive an appealing defendant of a substantial right?

It is respectfully urged that this Honorable Court grant Ballard's motion for Rehearing on Appeal in this case, and that it be reargued independently of his co-defendants.

Respectfully submitted,
THOMAS WHELAN
Attorney for Appellant
Louis Glen Ballard.

No. 15146.

IN THE

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OPENING BRIEF ON BEHALF OF

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No. 15146

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLIFFORD L. DUKE, JR., LOUIS GLENN
BALLARD and VIC BUONO,

Appellants

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF ON BEHALF OF
APPELLANT LOUIS GLENN BALLARD

INTRODUCTION

This is the opening brief on behalf of Appellant Louis Glenn Ballard. In this brief in the interest of brevity Appellant Louis Glenn Ballard will be referred to as "Ballard." Whenever appellants Clifford L. Duke, Jr. and Vic Buono are referred to they will be referred to as "Duke" and "Buono".

JURISDICTIONAL STATEMENT

The criminal prosecution in this case was instituted by an indictment containing ten counts. In Count IV the appellants Ballard, Duke and Buono and alleged unindicted co-conspirators were charged with a conspiracy in violation of U. S. C., Title 18,

Section 371. In Counts V and VI of the indictment appellant Ballard is charged in the Southern District of California with a violation of U. S. C. , Title 18, Section 545. The District Court, therefore, had original jurisdiction under the provisions of United States Code, Title 18, Section 3231.

Following motions made by appellant for dismissal of the indictment, for a severance and separate trial, and a motion for bill of particulars, which motions appear in the clerk's transcript, all of which motions were denied, the appellant was tried with his co-defendants Duke and Buono - the trial commencing on August 3, 1955 and ending on September 23, 1955 with a verdict of the jury finding appellant guilty as to Counts IV, V and VI.

Section 1291 of Title 28, U.S.C. vests appellate jurisdiction in the Court of Appeals of all final decisions of the District Courts of the United States.

The indictment (Cl. Tr. pp. 2, et seq.) constitutes the pleading necessary to prove jurisdiction and venue in the District Court hearing of the matter.

However, on August 19, 1955 after the Government rested its case, appellant moved for a judgment of acquittal as to Counts IV, V and VI, and in the event of denial of such motion that the court strike the testimony of witnesses Spicuzza and Hadzima as related to defendant Ballard, and that the testimony of witnesses Helm, Todd and Johnson be stricken as relating to Ballard. (Cl. Tr. p. 149, lines 18 - 24) At the same time appellant moved

for a mistrial. (Cl. Tr. supra)

On the last day that testimony was taken, September 13, 1955, and after both Government and defendants had rested this case, appellant moved for judgment of acquittal, for mistrial and to strike the testimony of certain witnesses.

(Cl. Tr. p. 223, lines 14-25)

All questions raised in this brief to be hereinafter discussed were presented on appellant's arraignment, on all subsequent proceedings in this cause, before the trial court, and on motion for new trial following conviction.

Following the denial of a motion for a new trial appellant gave timely notice of his appeal from the judgment of conviction and order denying motion for new trial to the United States District Court.

QUESTIONS INVOLVED

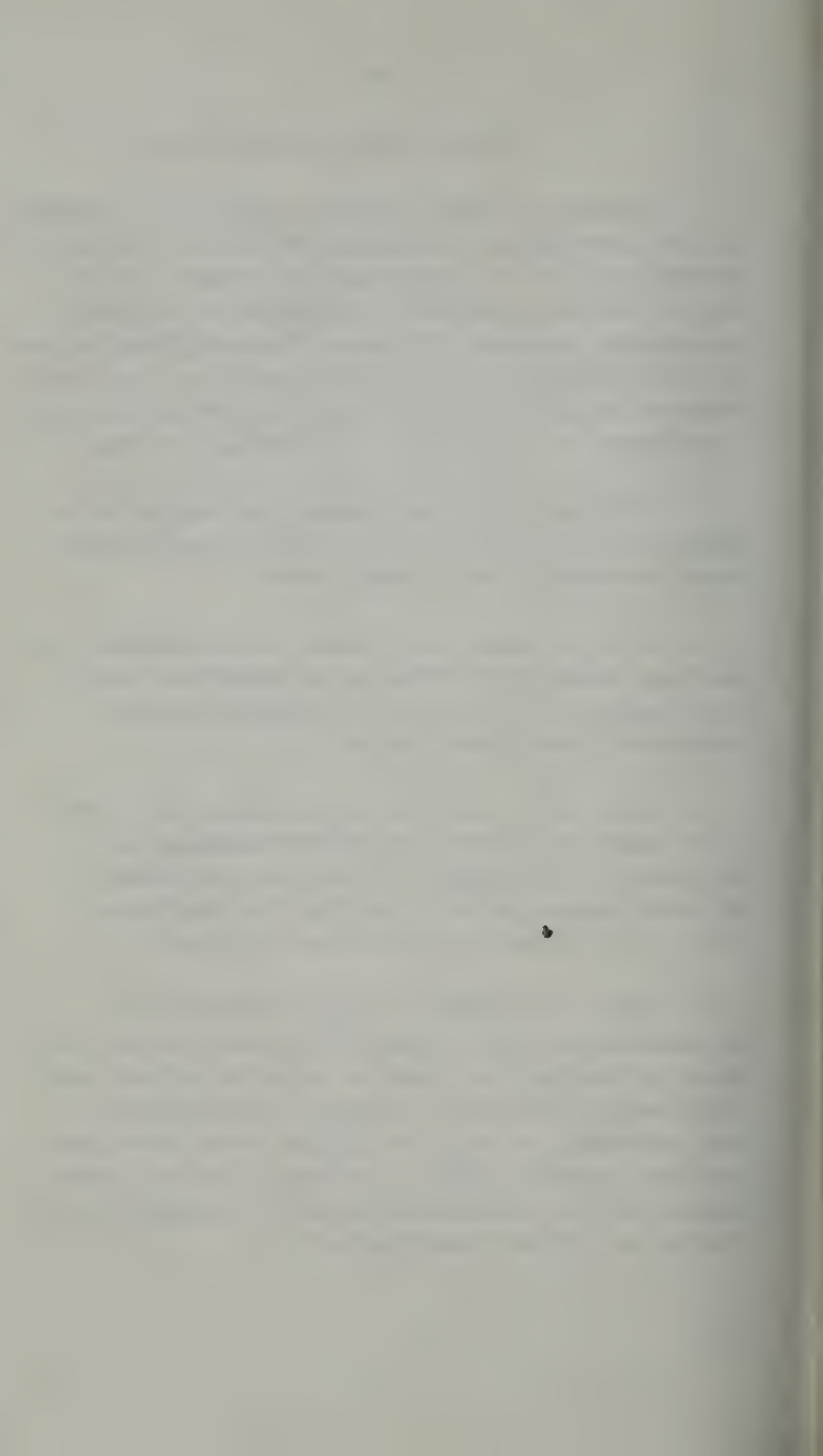
1. Could appellant Ballard lawfully be indicted for or convicted of violations of U. S. C. , Title 18, Section 545, or of conspiracy to violate that section when the objects of importation were psittacine birds, in view of Code of Federal Regulations, Title 42, Section 71.152 which governs the importation of such birds and violation of which is made a misdemeanor by U. S. C. , Title 42, Section 271?

2. Did the trial court abuse its discretion in denying Ballard's motion for bill of particulars when seasonably and timely made?

3. Did the trial court abuse its discretion in denying Ballard's motion for a severance and trial separate from his co-defendants when seasonably and timely made?

4. Can a trial court in instructing a jury properly state to a jury - not in commenting on testimony or weighing or analyzing testimony - but as a matter of cold law that the testimony of an alibi witness should be scrutinized?

5. Can a defendant on trial with two co-defendants be called upon by the court in the presence of the jury to state as to which of two positions he will assume, join with the position of one defendant or with that of the other defendant who has raised a special defense? Is such procedure not in violation of the Fifth Amendment to the United States Constitution?



MANNER IN WHICH QUESTIONS RAISED

These questions were raised by Ballard at the times set forth in the specification of errors by appropriate motions which were denied by the court. The motions made and the time of making them and the record thereof are set forth in the specification of errors.

SPECIFICATION OF ERRORS

Specification of errors numbers 1 to 10 set out herein were raised by Ballard by motions at the times set out in each numbered specification of error and in each instance by the trial court denied. In each of said numbered specification of error there is appropriate reference to the Clerk's Transcript.

1. The trial court erred in denying appellant Ballard's motion to dismiss the indictment. (Cl. Tr. pp. 15; 18, 19, 20; 31- 32; 68)

2. The trial court erred in denying appellant Ballard's motion for a severance and separate trial. (Cl. Tr. pp. 42, 43; 67, 68)

3. The trial court erred in denying appellant Ballard's motion for a bill of particulars. (Tr. pp. 21-27; 67-72; p. 77)

4. The trial court erred in denying appellant Ballard's motion for judgment of acquittal at the conclusion of the Government's case. (Cl. Tr. pp. 149-50)

5. The trial court erred in denying appellant Ballard's motion for a mistrial at the conclusion of the Government's case. (Cl. Tr. pp. 149-50)

6. The court erred in denying appellant Ballard's motion for a mistrial after all parties had rested. (Cl. Tr. p. 223)

7. The trial court erred in denying appellant's motion to strike all of the testimony of the witnesses Spicuzza, Hadzima, Helm, Todd and Johnson which related or purported to relate to Counts I, II, III, VII, VIII, IX and X of the indictment, which Counts Ballard was not named as either a defendant or an unindicted co-conspirator.

8. The trial court erred in denying appellant Ballard's motion to strike the testimony of the handwriting expert Fred Miller, the witnesses Giger and Johnson made after all parties had rested. (Cl. Tr. p. 223)

9. The court erred in denying appellant Ballard's motion for a new trial. (Cl. Tr. pp. 293-295, refer to pp. 270 - 283, inclusive)

10. The trial court erred in his comment on the facts and in instructions:

(a) By calling upon Ballard in the presence of the jury to assume a position as to whether in his defense he would side with defendant Duke or defendant Buono. (Tr. p. 3213-14) and in his comment assuming that there was a conspiracy;

(b) By advising the jury that the testimony of the only two witnesses called in behalf of Ballard (alibi witnesses) should "scrutinized".

(Tr. p. 5094, lines 15-24)

11. The court erred in admitting the testimony of witnesses Miller, Springman and Giger as not rebuttal. (circumstances and reference to record set forth in section headed "Evidence Improperly Admitted Against Ballard")

12. The court erred in admitting the testimony of witness Crump as not rebuttal. (Circumstances and reference to record set forth in section headed "Evidence improperly admitted against Ballard")

13. The court erred in admitting the testimony of the witness Johnson as to a transaction not charged in the indictment, as being irrelevant and after bill of particulars denied. (Circumstances and reference to record set forth in Argument that bill of particulars improperly denied.)

14. The court erred in denying Ballard's motion in arrest of judgment. (Cl. Tr. p. 269-93)

STATEMENT OF THE CASE

It is undisputed that the witness, John W. Hadzima, was engaged in the business of smuggling psittacine birds into the United States from 1949 until a short time prior to this trial; from about 1950 to at least March of 1953 the witnesses John W. Hadzima, Nicholas A. Spicuzza and George Todd were engaged in a joint enterprise to smuggle psittacine birds into the United States from a foreign country.

All of the witnesses called by the Government in this case in its case in chief, except the witness, Deputy Sheriff Thomas E. Johnson, who testified on August 17, 1955, were either convicted of smuggling, conspiracy to smuggle (a felony) or admitted such illegal participation. They were:

John W. Hadzima, a twice convicted smuggler
Nicholas A. Spicuzza, a twice convicted
smuggler

George Todd, a twice convicted smuggler

Raymond Curtis, convicted smuggler

Robert Helm, convicted smuggler

Mary Asconi, admitted handler of psittacine
birds known by her to have been smuggled

We will point in another portion of this brief why the testimony of Deputy Sheriff Thomas E. Johnson was not legally admissible.

That leaves us the factual situation with one witness giving irrelevant testimony and six

witnesses, all of them felons or admitting to felonies, all of them obviously interested in the outcome of this case, the only witnesses against appellant.

The evidence in this case implicating appellant comes largely from the incident known as the Desert Center Hijacking, which it is claimed occurred on May 13, 1953.

The evidence concerning Desert Center "hijacking", which appellant contends is the only evidence in support of Counts IV, V and VI, as far as Ballard is concerned, is that Helm claims he told Hadzima, Pursselley, Duke, Buona and Ballard that Spicuzza and Todd were flying birds into Desert Center and that plans were made to rob and steal these birds from Spicuzza and Todd, or their agents. The date the birds were to be landed was May 13, 1953. Spicuzza, Curtis, Hadzima and Helm fixed the date of the hijacking as May 13, 1953. Mary Asconi said the birds were delivered to her aviary in Burbank, California by Hadzima on the early morning of May 14, 1953.

In view of what is later herein said concerning the proclivity of Spicuzza and Todd as smugglers, Ballard urges that the testimony of Spicuzza, Curtis, Hadzima, Helm and Ascani prove no violation of the charges contained in the indictment with reference to Ballard.

According to their own testimony, Spicuzza and Todd were engaged in the smuggling of psittacine birds. The witness, Raymond A. Curtis, an employee of Jack Young of Cleveland, Ohio, was a

dealer in smuggled birds. Mary Asconi was a dealer in smuggled birds. Robert Helm, according to his own testimony, was in the employ of Spicuzza and Todd in flying in smuggled birds. Hadzima had been a partner of Spicuzza and Todd in smuggling birds. He testified he procured the services of Ballard, through Pursselley in 1953, to steal birds in the United States from Spicuzza and Todd.

Whether appellant Ballard lived or died, or was unheard of, Spicuzza and Todd would have smuggled birds. They had in the past and continued to do so after their conviction in Case No. 22891, Southern Division, San Diego, California. That this is so is proven by the fact that after their release on bail, pending appeal in Case No. 22891, in cooperation with Helm they smuggled psittacine birds in December of 1953 and were thereafter convicted and sentenced to prison.

Facts offered on behalf of appellant, found adversely to appellant by the jury, were in the testimony of Alma Ballard, wife of defendant, and Clayton Beraldo, both residents of Santa Barbara, California, that appellant was in Santa Barbara, California on May 13, 1953 and therefore could not have been at Desert Center, California, over 200 miles distant, on that same night.

ARGUMENT.

I.

APPELLANT BALLARD COULD NOT LAWFULLY BE PUNISHED FOR VIOLATIONS OF UNITED STATES CODE, TITLE 18, SECTION 545, NOR OF CONSPIRACY TO VIOLATE SAID SECTION, ON ALLEGATIONS AND EVIDENCE SHOWING THAT THE OBJECTS THE IMPORTATION OF WHICH WAS INVOLVED WERE PSITTACINE BIRDS.

At all pertinent times certain provisions of the laws of the United States were as follows:

(1) The first paragraph of 18 USC 371 makes it a felony for two or more persons to conspire to commit an offense against the United States. The second paragraph of said section makes the conspiracy a misdemeanor, if the offense which is the object of the conspiracy is only a misdemeanor.

(2) 18 USC 545 is a general statute prohibiting the importation of merchandise contrary to law, and punishable as a felony.

(3) 42 CFR 71.152 is a specific regulation adopted pursuant to 42 USC 264 expressly prohibiting the importation of psittacine birds into the United States except under specified conditions. 42 USC 271 makes a violation of the specific law a misdemeanor.

(4) 18 USC 42-42 is a specific statute pertaining to animals, birds and fish and makes it a misdemeanor to import or transport any wild animal or bird from a foreign country contrary to any act of Congress or in violation of regulations of the Secretary of the Treasury.

Count IV of the indictment charged Ballard with the crime of conspiracy to commit an offense against the United States. The offense alleged to be the object of the conspiracy was the smuggling and illegal importation and transportation of psittacine birds.

Ballard was sentenced to prison for five (5) years on this count. By reason of the first paragraph of 18 USC 371 it is respectfully contended here that this punishment was excessive and that the offense should have been punished by the lesser penalty, according to the second paragraph of 18 USC 371.

With respect to Counts V and VI Ballard was sentenced to prison for two (2) years on each count to run consecutive. It is appellant Ballard's contention that the allegations of the indictment and the evidence produced by the Government tended to show commission of offenses and conspiracy to commit offenses punishable as misdemeanors under 42 U. S. C. A., Sec. 271 (a) or 18 USC 42 and 43, and that violation of neither could be proven without proving violation of the other, and that, in these circumstances, the prosecution must be for commission of and conspiracy to commit the offense carrying the lesser penalty.

In Steiner vs. United States, 229 F.2d 745 (C. A. 9, this Honorable Court rejected the identical questions under this topic, stating that they were without merit. (Two appellants in the Steiner case filed separate petitions in the United States Supreme Court for a writ of certiorari. Both petitions were denied on May 28, 1956, 76 S. Ct. 845 & 847) However, since the decision by this Honorable Court in the Steiner case, the United States Supreme Court,

decided Berra vs. U. S., U. S., 100 L. Ed. 563, 76 S.Ct. 685, on April 30, 1956. In that case, Mr. Justice Harlan, speaking for a majority, refused to consider the effect of overlapping criminal statutes proscribing identical conduct but imposing different punishments. The only issue before the Court, as viewed by the majority, was whether the trial court erred in refusing to instruct the jury that they could find petitioner guilty of the offense which provided the lesser penalty. In holding no error, the Court stated at 688:

"Whatever other questions might have been raised as to the validity of petitioner's conviction and sentence, because of the assumed overlapping of (sections) 145(b) and 3616(a), were questions of law for the court. No such questions are presented here. "

In a dissenting opinion, Mr. Justice Black, with whom Mr. Justice Douglas joined, took the position that the case should be reversed or at least remanded for re-sentencing under the misdemeanor statute, stating at 690 and 691:

"The Government argues . . . 'the prosecution may be for a felony even though the Government could have elected to prosecute for a misdemeanor.' Election by the Government of course means election by a prosecuting attorney . . . I think we should construe these sections so as not to place control over the liberty of citizens in the unreviewable discretion of one individual . . . "

"A basic principle of our criminal law is that the Government only prosecutes people

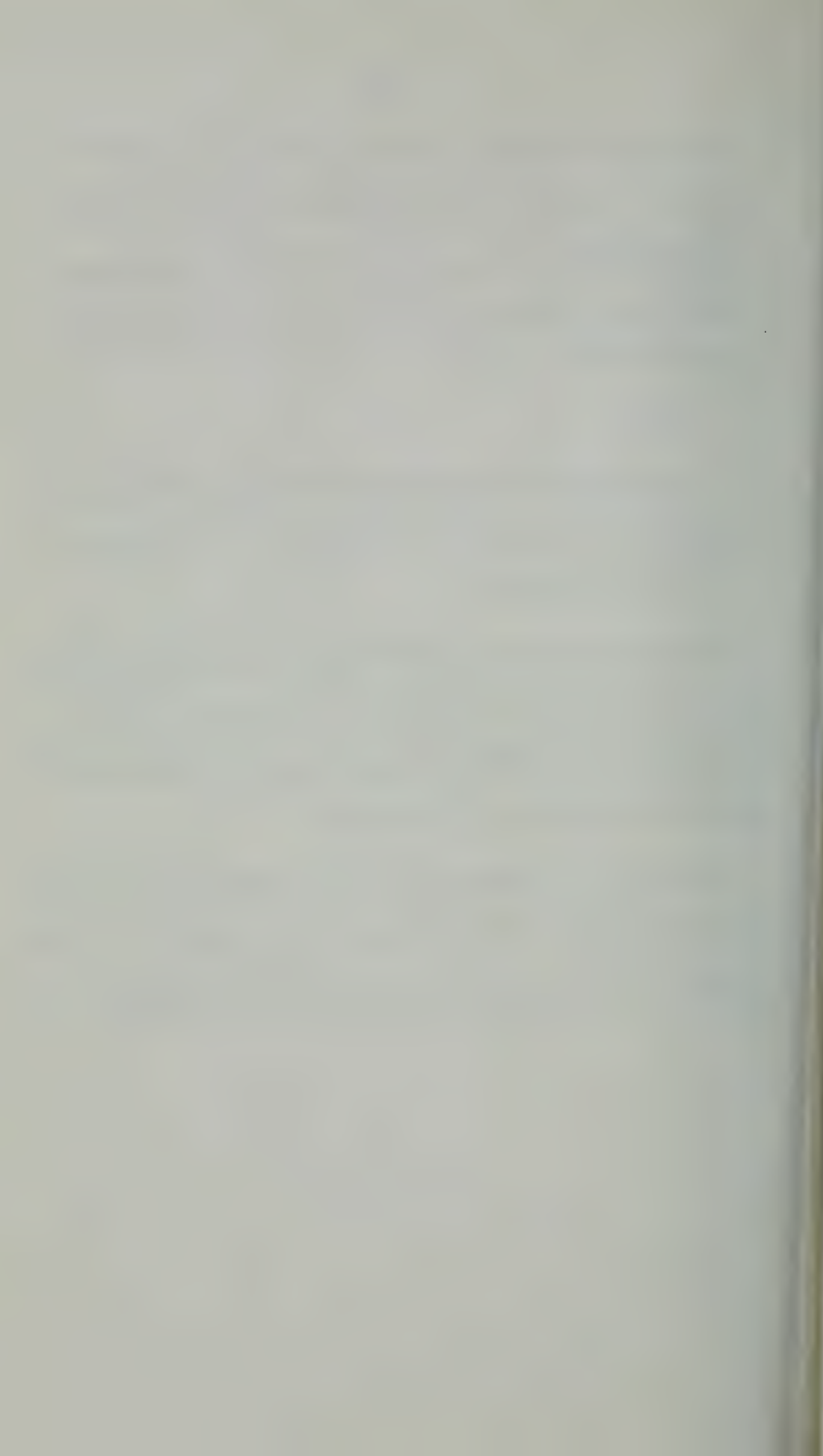
for crimes under statutes passed by Congress which fairly and clearly define the conduct made criminal and the punishment which can be administered. This basic principle is flouted if either of these statutes can be selected as the controlling law at the whim of the prosecuting attorney or the Attorney General.

* * *

"Substitution of the prosecutor's caprice for the adjudicatory process is an action I am not willing to attribute to Congress in the absence of clear command. "

It is respectfully submitted that this Honorable Court should reconsider its decision in the Steiner case, supra, in the light of the Supreme Court decision in the Berra case, and determine whether or not the present case should not be remanded at least for correction of sentence.

Although the Supreme Court denied the petitions for writ of certiorari filed by two of the appellants in the Steiner case after the Berra case, it is submitted that such denial is not a determination by the Supreme Court that this contention is without merit.



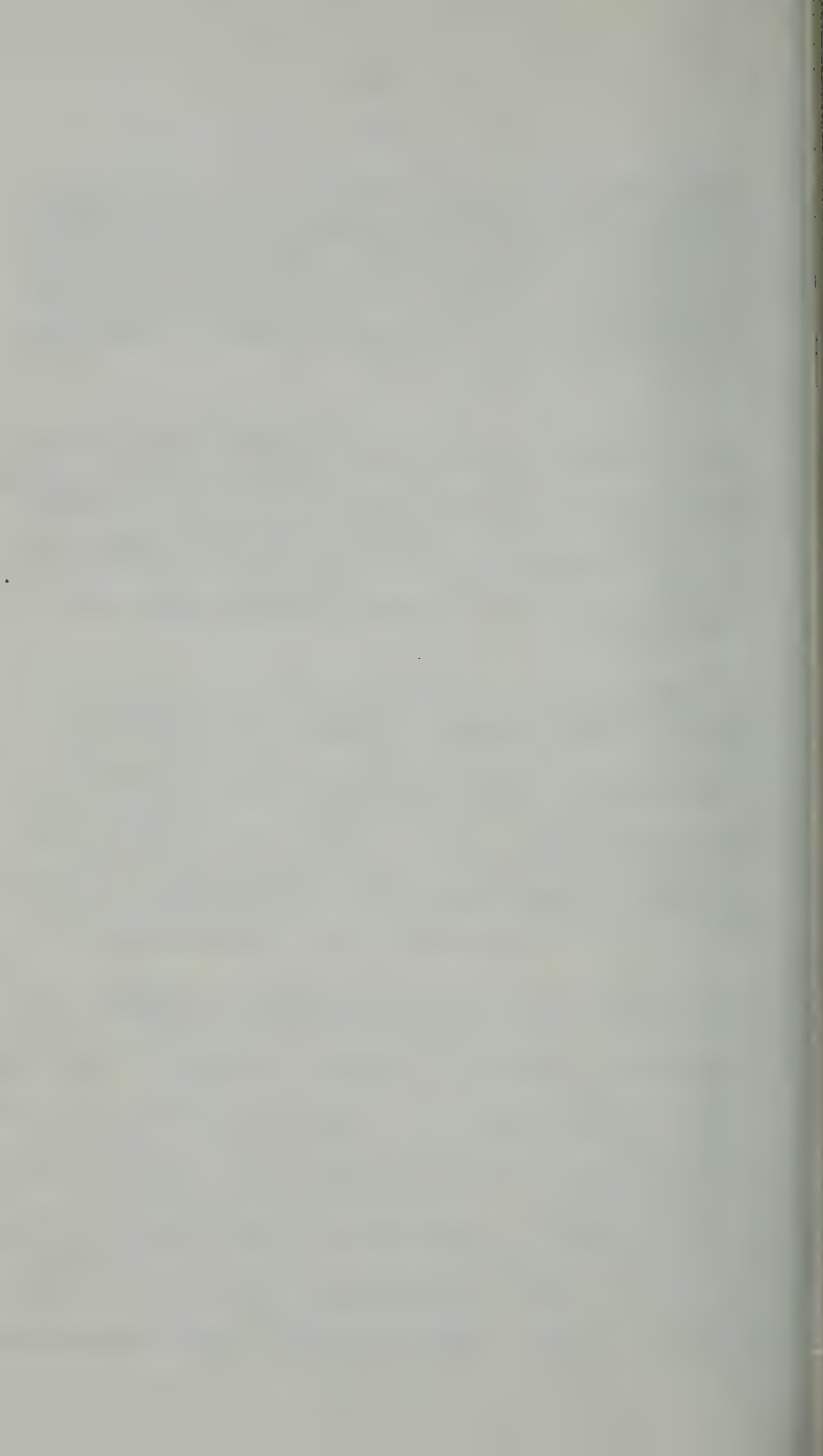
II.

THE JUDGMENT IN COUNTS V & VI IMPOSING CONSECUTIVE PUNISHMENT SHOULD BE REVERSED BECAUSE INSUFFICIENT FACTS ARE ALLEGED IN THOSE COUNTS TO CONSTITUTE ANY OFFENSE PUNISHABLE UNDER THE LAWS OF THE UNITED STATES.

Count V of the indictment charged that on May 13, 1953 Ballard, together with Duke and Buono, smuggled thirty crates of psittacine birds which should have been invoiced, and that said birds were imported in violation of United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof.

Count VI of the indictment charged that on May 13, 1953 Ballard, together with Duke and Buono, received, concealed and facilitated the transportation and concealment of thirty crates of psittacine birds. (Same birds mentioned in Count V) with knowledge they had been imported contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof.

Appellant made a timely motion to dismiss the indictment on the grounds set forth in this question. Appellant's motion was denied. Appellant made the same motion in arrest of judgment on September 30, 1955, and the motion was again denied. Appellant also made a timely motion for a bill of particulars which was denied. All the evidence produced by the Government concerned the importation and transportation of psittacine birds. The court instructed the jury that the "merchandise" referred to in the indictment (i. e., psittacine birds) should have been invoiced. (Tr. p. 5084, lines 9 - 12)



The court further instructed the jury that under the law all merchandise imported from any contiguous country must be presented to a customs officer for inspection at the first port of entry at which merchandise arrives. Further, an "entry" must be made for all imported merchandise within 48 hours after the arrival of such merchandise in the country. For this purpose the person making such entry must produce an invoice for the merchandise. Every person making an entry must file with the entry a declaration, under oath, which declaration states that the information contained in the entry, the invoice, and any other document filed with the entry are true. (Tr. 5080-81)

Appellant submits that the indictment on its face is fatally defective because:

1. Psittacine birds are not "merchandise which should have been invoiced". Under the Code of Federal Regulations psittacine birds could not have been imported into the United States except in the manner authorized under the exceptions allowed in Section 71.152 of Title 42 of the Code of Federal Regulations. Therefore, to require entry and invoicing of psittacine birds 48 hours after importation would in effect compel a person to accuse himself of a crime, to wit: a violation of the Code of Federal Regulations with reference to the importation of psittacine birds.

2. The allegation that psittacine birds were brought in contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484, is not sufficient because no fact or facts are alleged which would show unlawful importation, or a violation of these sections. Furthermore, such allegations are vague and ambiguous because Chapter 4 of Title 19 of the United States Code contains more than two-hundred sections with numerous prohibitions

the violation of each of which is a crime calling for a certain specified penalty. The penalty in some instances is a nominal fine and in others imprisonment for as long as five years.

The pertinent part of Section 545 of Title 18, United States Code reads:

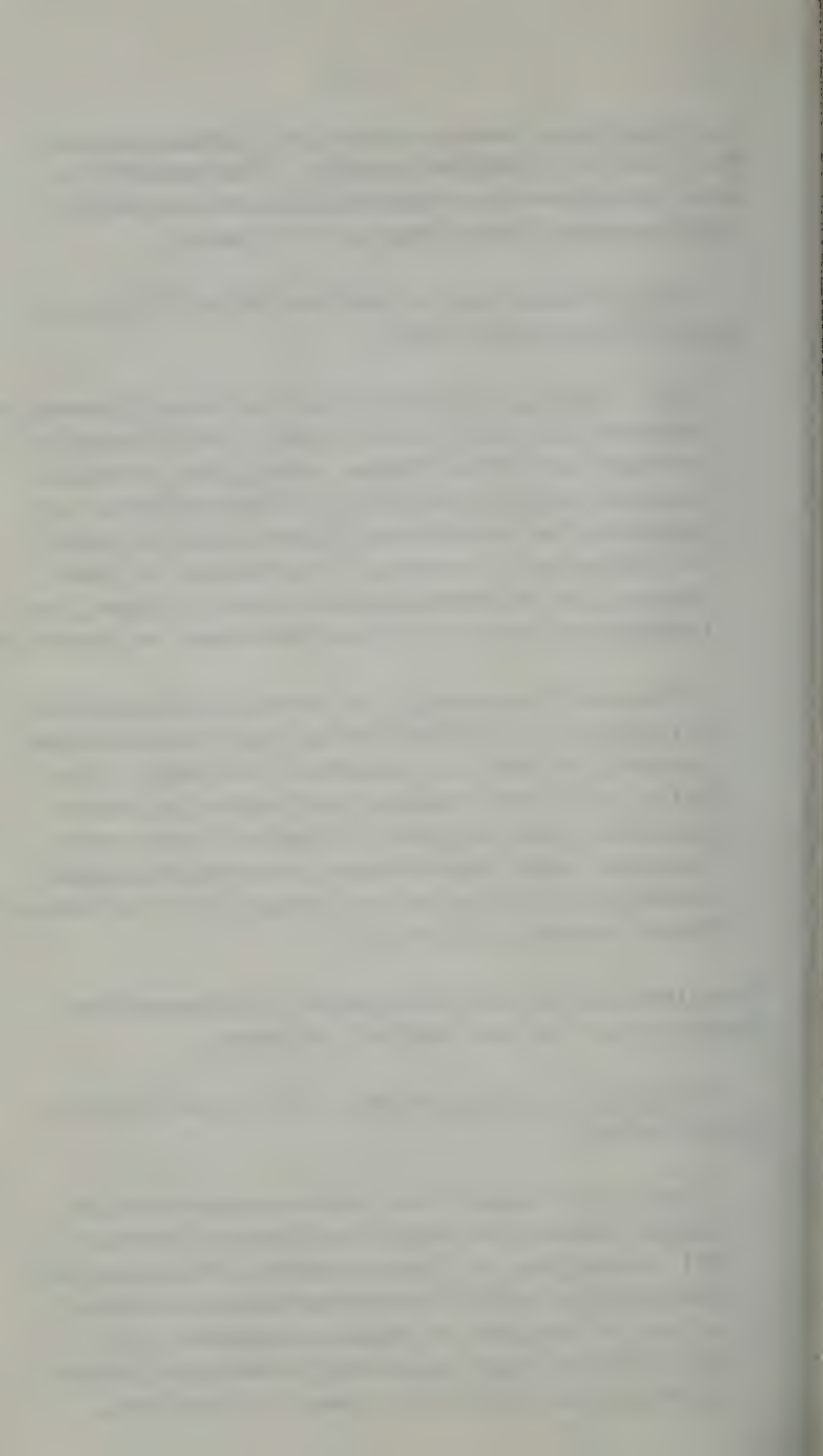
"545. Smuggling goods into the United States.-- Whoever knowingly and wilfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice or other document or paper; or

"Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law --"

The first and second paragraphs of this section charge separate and distinct offenses.

In Babb vs. United States, 218 F. 2d 538, the court stated:

"The statute under which this prosecution is lodged defines two separate types of offenses: (A) smuggling or clandestinely introducing any merchandise which should have been invoiced, or use of various or forged documents, etc.; and (B) knowingly importing or bringing in any merchandise contrary to law, or receiving,



concealing, etc., such merchandise knowing it to have been brought in contrary to law. These are distinct offenses, as shown by their legislative history. "

It is submitted that the first paragraph would apply to merchandise which could be lawfully imported, and the second paragraph would apply to the importation of merchandise in violation of any other statute or regulation. The first paragraph is directed specifically to the protection of the revenue of the United States, since an essential ingredient of the offense is an intent to defraud the United States of revenue.

U. S. vs. Kushner, 135 F. 2d 668

The purpose of requiring an invoice to be presented for imported goods is to enable the collector of customs to properly determine the duties to be imposed. Section 1461 of Title 19, United States Code prescribes ten items of details required to be set forth in an invoice. It is apparent that those items are for the purpose of assessing a duty on the imported articles.

Section 1484(a) of Title 19, United States Code provides that:

" . . . the consignee of imported merchandise shall make entry therefor . . . Such entry shall be made at the custom house within 48 hours . . . after entry of the importing vessel or report of the vehicle. . . "

Section 1484(b) provides:

"No merchandise shall be permitted to entry without the production of a certified invoice therefor . . . "



Although Count V of the indictment in this case purports to charge a violation of both the first and second paragraphs of Section 545 of Title 18, Count VI only purports to charge a violation of the second paragraph. The attempt to charge in Count V a violation of the first paragraph is abortive.

In Babb vs. United States, supra, the indictment charged that the defendants had knowingly, wilfully and fraudulently concealed, transported and facilitated the transportation of certain merchandise, to wit; approximately eight head of cattle, after importation each knowing the same to have been imported and brought into the United States contrary to law. The court stated:

"We held that the indictment should have alleged some fact or facts showing that the cattle in question were imported or brought in contrary to some law, and that it is not enough to say that they were imported or brought in 'contrary to law'."

The indictment in this case does not meet the objection stated in the Babb decision. It is no more effective to charge that merchandise was brought into the United States contrary to a section of the United States Code than it is to state that the merchandise was brought in "contrary to law".

In Sutton vs. United States, 157 F. 2d 661, the court stated:

". . . Turning to the information, we note that at a certain time and place the appellant had in his possession and under his control ten thousand pounds of sugar, the same being a rationed commodity. The mere possession or control of

rationed sugar is not an offense, and yet the information charges no other fact unless the following words constitute an allegation of fact:

'In violation of Second Revised Ration Order Number 3 and General Ration Order Number 8, as amended.'

"The phrase just quoted is not an allegation of fact but a legal conclusion of the pleader; it constitutes no part of the description of the offense. In The Hoppet vs. United States, 7 Cranch 389, 393, 3 L. Ed. 380, Marshall, C. J., said:

'It is not controverted that in all proceedings in courts of common law, whether against the person or the thing for penalties or forfeitures, the allegation that the act charged was committed in violation of law, or of provisions of a particular statute, will not justify condemnation, unless, independent of this allegation, a case be stated which show that the law has been violated. The reference to the statute may direct the attention of the Court, and of the accused, to the particular statute by which the prosecution is to be sustained, but forms no part of the description of the offense. . . .'

It is respectfully submitted that both counts V and VI of the indictment do not allege facts sufficient to constitute a cause of action because first, as to Count V the importation of psittacine birds if punishable at all under 18 U. S. C. 545, such conduct is an offense under the second paragraph of said section rather than the 1st; and second, the allegation in both Counts V and VI that psittacine birds were imported contrary

to 19 U. S. C., Chapter 4, particularly sections 1461 and 1484, does not state facts sufficient to constitute a cause of action.

In Steiner vs. United States, 229 F. 2d 745, this Honorable Court approved the decision in the Babb case, supra, and reversed the judgment of conviction on the substantive counts, because the allegation "contrary to law" was insufficient and could not be cured by a request for bill of particulars.

It is respectfully submitted that the allegation stating that merchandise was imported contrary to certain provisions of the United States Code is no different than the allegation "contrary to law".

III.

THE MOTION OF APPELLANT FOR A BILL OF PARTICULARS AS TO COUNTS IV, V & VI SHOULD HAVE BEEN GRANTED.

The motion of Ballard for a bill of particulars as to Counts IV, V and VI should have been granted. The case of United States vs. Lieberman, 15 Fed. Rules Decision 278, in the opinion of Ballard is controlling as to Counts V and VI of the indictment.

United States vs. Lieberman, supra, is also authority for the proposition that the defendant is entitled to a bill of particulars as to Count IV of the indictment.

In United States vs. Lieberman, supra, the case of United States vs. Eastman is cited, and the opinion of Judge Learned Hand is quoted there. The case of United States vs. Eastman was conspiracy

case and Judge Hand ruled that although the allegations of the indictment as they stand would support a prosecution, nevertheless the defendants were entitled to a bill of particulars.

The fact that the defendants were charged with conspiracy does not take away their right to a bill of particulars if the indictment fails to advise the defendant with sufficient particularity to enable him to prepare his defense, and to safeguard him from further prosecution for the same act.

The Government cannot avoid the responsibility of furnishing a bill of particulars by claiming that they are not required to disclose their case or by claiming that the defendant being charged must necessarily know of what he is accused.

"Before a person can become a 'conspirator' or an 'abettor', knowledge of wrongdoing of other is not sufficient, but he must in some sense promote their venture himself, make it his own, or have a stake in its outcome. "

United States vs. Falcone, 109 F. 2d 109
affirmed 61 S. Ct. 204, 311 U.S. 205,
85 L. Ed. 128.

In further support of the claimed error that a bill of particulars should have been granted, and in support of the contention that evidence was introduced beyond the scope of the charge contained in the indictment, Ballard respectfully submits:

Assuming, but not conceding, the indictment sets forth the facts constituting the essential elements of the offense charged so that it cannot be pronounced bad upon the motion to quash or dismiss, Counts IV,

V and VI are couched in such language that the defendant is liable to be surprised by the production of evidence for which he is unprepared and is therefore entitled to a bill of particulars:

Rinker vs. United States, 151 F. 755 at 759:

"A bill of particulars should be furnished if the indictment fails to advise the defendant with sufficient particularity of matters necessary to enable him to prepare his defense and to safeguard him from further prosecution for the same act. "

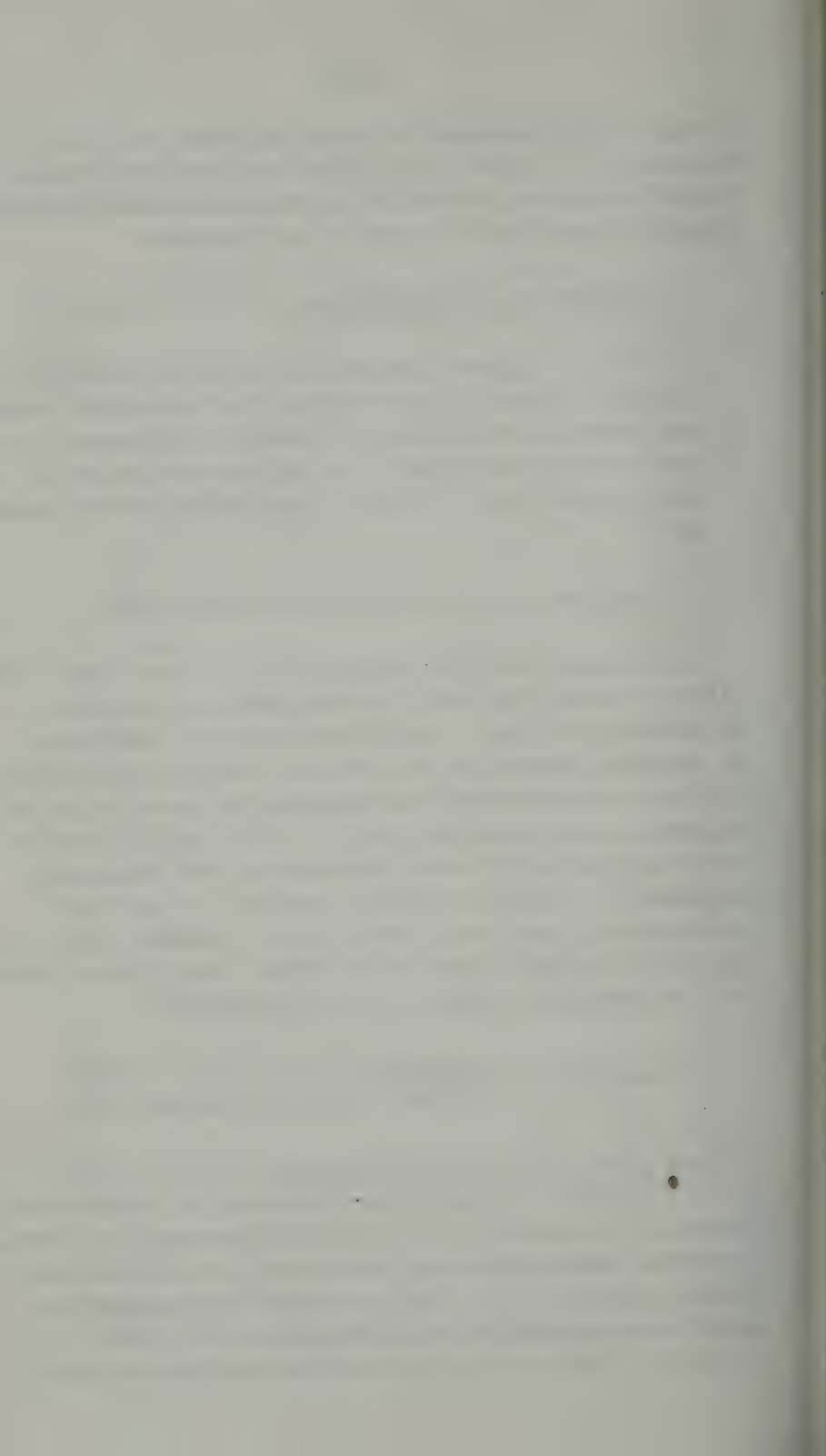
Lett vs. U. S., 15 Fed. 2d, 686 at 688.

Indictment charging defendant with knowingly and wilfully smuggling and clandestinely introducing diamonds into the United States was not sufficient to apprise defendant of precise charge against him and government would be required to provide by bill of particulars information as to whether defendant was charged with having introduced the diamonds personally or having aided, abetted, counselled, commanded, induced, procured or caused such introduction and if one of the latter acts, which one, and the means by which it was performed.

U. S. vs. Lieberman, (D. C. N. Y. 1953)
15 Fed Rules Decisions 278

In Fishwick vs. United States, 329 U. S. 211, 67 S. Ct. 224, the indictment charged a conspiracy, between September 1, 1939 and September 13, 1944, (date the indictment was returned), to defraud the United States, etc. The last overt act alleged to have been committed was December 23, 1940.

Held: The overt acts averred and proved may



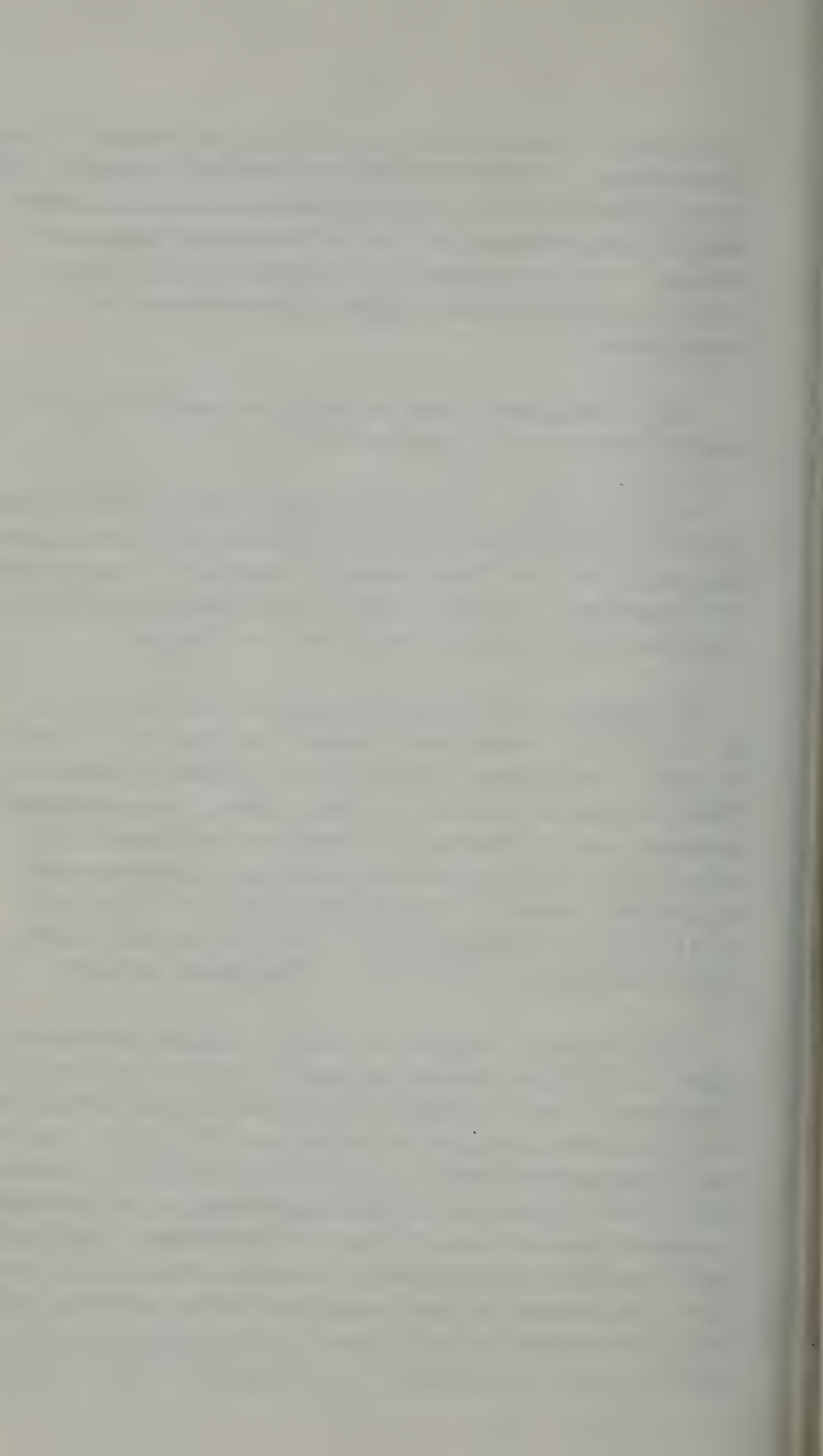
thus mark, the duration as well as the scope of the conspiracy. CONVICTION REVERSED because trial court allowed statements of defendants made after date of last averred act to be introduced against others. The conspiracy terminated before statements made, thus not made in furtherance of conspiracy.

The termination date alleged in conspiracy by implication held not material.

In Fishwick vs. United States, supra, the Supreme Court of the United States indicates that it is against the policy of the Government to sustain prosecutions for conspiracy which under the prosecution's theory continue after the last overt act is alleged.

In Glasser vs. United States, 315 U.S. 60, 62 S. Ct. 457, a conspiracy case, the Supreme Court held the indictment sufficient as against demurrer. That the particularity of time, place, circumstances, causes, etc. in stating the manner and means of effecting the objects of a conspiracy not essential to the indictment - "SUCH SPECIFICITY OF DETAIL FALLS RATHER WITHIN THE SCOPE OF A BILL OF PARTICULARS." (Emphasis added)

On Tuesday, August 2, 1955, Ballard received a copy of the trial memorandum furnished by the U. S. Attorney. On Wednesday, August 3rd the entire day was consumed in the selection of a jury. On Thursday, August 4th some time was consumed in settling the status of Duke as a defendant and as to his right to participate as an attorney. Thereafter, and before the Government's opening statement was made to the jury, defendant Ballard objected to the introduction of any evidence as to alleged transactions which occurred before the date of the conspiracy as charged



in Count IV of the indictment, and as to any transactions that occurred after the last dated overt act charged in IV of the indictment; and at that time Ballard pointed out to the Hon. Ernest A. Tolin in response to the court's query that these matters had been raised before Judge Weinberger in June of 1955 at the time demand was made for the bill of particulars.

The clerk's transcript, pages 70-72, shows that Ballard filed supplemental authorities in support of his motion for a bill of particulars. At that time Ballard did not know and could not foresee that the Government would offer evidence as to transactions occurring prior to the date alleged as to consummation of the conspiracy.

However, in view of the charge that the conspiracy in Count IV extended to December, 1954, and the last overt act charged in Count IV of the indictment was June, 1953, Ballard was pressing hard to find out at least the outline of what the Government planned to support the alleged conspiracy between June, 1953 and December, 1954.

On pages 70 and 71 of the clerk's transcript, Ballard makes the point that whether a motion for a bill of particulars was granted or not, that he anticipated that the trial court would not permit evidence pertaining to the alleged conspiracy as to matters occurring after the last overt act. Again it is pointed out that as shown by the record, that this factual situation was called to the attention of Judge Tolin prior to the Government making its opening statement and as expeditiously as possible after receiving the Government's trial memorandum.

(Tr. pp. 48-52; App. 134-38)

Ballard contends that it was improper under the circumstances to receive the evidence of Deputy Sheriff Johnson and of Hadzima as to transactions occurring in February and March, 1953, and the testimony of Hadzima as to what occurred on certain dates following July, 1953.

IV.

APPELLANT MADE A TIMELY MOTION FOR A SEVERANCE FROM HIS CO-DEFENDANTS WHICH WAS DENIED, AND APPELLANT WAS SUBSTANTIALLY PREJUDICED AND DEPRIVED OF A FAIR TRIAL BY REASON THEREOF.

The indictment contained ten counts. Appellant was charged in only three of said counts. Furthermore, these counts pertained to a single transaction concerning a conspiracy to illegally import psittacine birds, and two substantive counts concerning the illegal importation and transportation of the same birds. The conspiracy and the two substantive counts of which Appellant was charged involved a specific transaction alleged to have occurred on May 13, 1953.

The indictment alleged two other separate conspiracies and five other substantive counts, none of which contained any allegations against appellant.

Appellant made a timely motion that he be tried separately from his co-defendants, or that the trial be severed so as to try the three counts in which Appellant was named separately from the remaining seven counts. Both motions were denied.

At the conclusion of the Government's case in chief, Ballard made a motion for a mistrial on the grounds that he had been substantially prejudiced on account of evidence received in support of the charges in Counts I to III, and Counts VII to X of the indictment, which did not pertain to Ballard. Likewise, Ballard moved to strike from the evidence all testimony of the witnesses Spicuzza, Todd, Helm and Hadzima wherein said testimony related to Counts I to III and Counts VII to X of the indictment on the grounds that said testimony, insofar as Ballard was concerned, was not binding on him and had no reference to the charges contained in Counts IV, V and VI where he was named as a defendant.

(Tr. pp. 1891 - 97; App. 320-27)

Both motions were denied. (Cl. Tr. p. 150)

The evidence introduced by the Government in support of the charges contained in the seven counts of the Indictment in which Appellant was not named was highly prejudicial and had the effect of subjecting Appellant to those evils inherent in a "mass trial". It is respectfully submitted that had Appellant been tried separately from his co-defendants that the verdict of the jury would have been otherwise, and that as a matter of law the motion for severance or motions for mistrial should have been granted.

United States vs. Perlstien, 120 F. 2d 276

Castellani vs. United States, 64 F. 2d 636

United States vs. Merchant, 25 U. S. 80

United States vs. Ball, 163 U. S. 672

In this case not only was Ballard deprived of a fair and impartial evaluation by the jury of evidence as to his guilt or innocence, separate and apart from the evidence admitted against his co-defendants, but quite to the contrary, Ballard, who did not take the witness stand, was called upon by the trial judge in the presence of the jury to choose between one or two conflicting positions being taken by his two co-defendants.

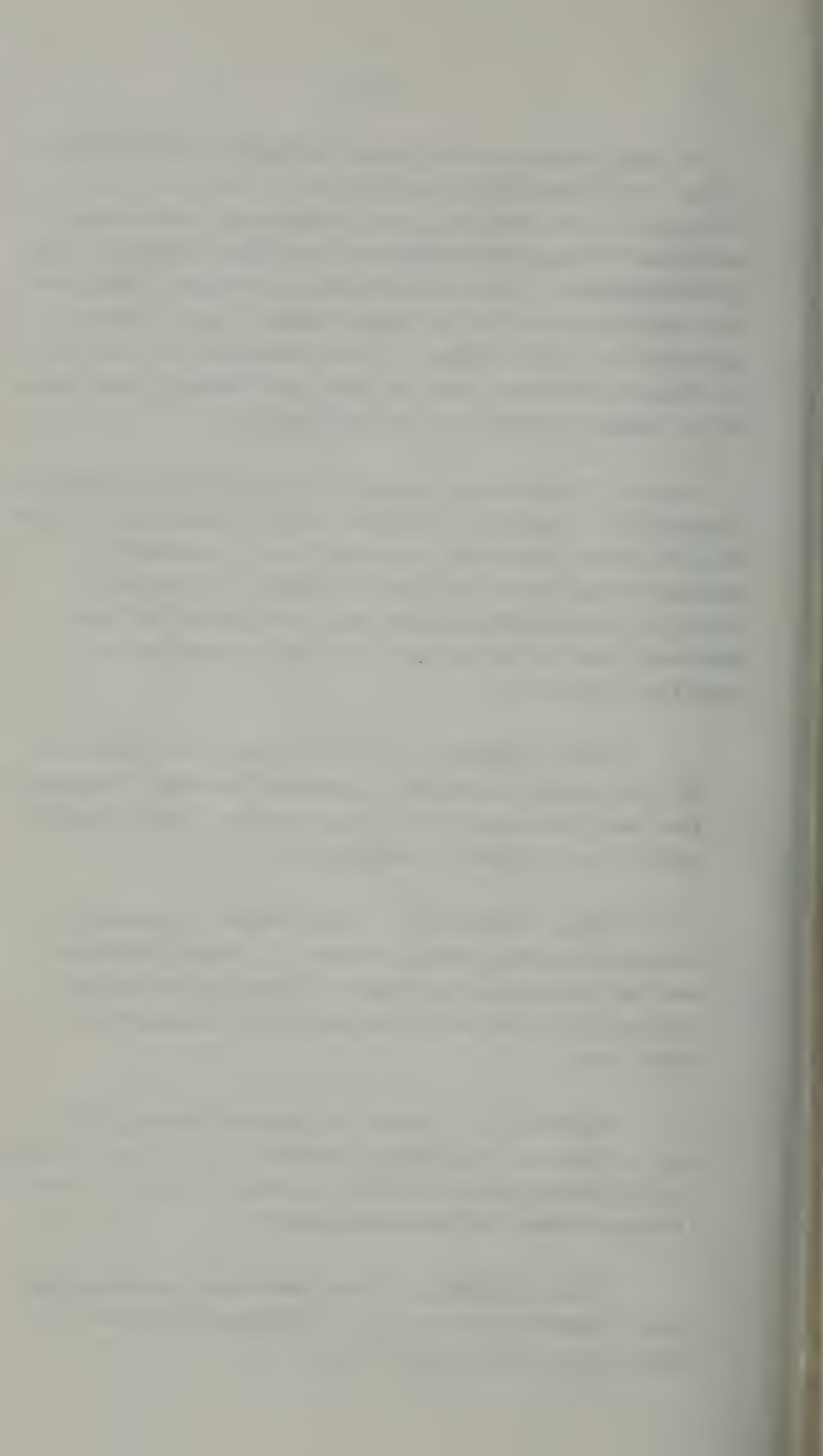
As an illustration, appellant refers to Reporter's Transcript, pages 3213 and 3214 where the following colloquy between the court and counsel for Ballard took place in the presence of the jury, after an extended discussion, which to Ballard seemed like an argument, to the prejudice of appellant Ballard.

"(THE COURT): * * * Now, Mr. Whelan, do you want to state a position for Mr. Ballard? Do you join with Mr. Duke or are you at odds with him, as Mr. Langford is?

"MR. WHELAN: Your Honor pleases, I am not at odds with anyone. I think perhaps, as the evidence develops, there be some explanation as to why Ballard was included in this case.

"Naturally, I want to take advantage of any situation that does develop. I am not claiming anything particularly at this time, unless it is supported by the evidence.

"THE COURT: Your defense, insofar as I have observed here, is a defense of alibi. 'I wasn't present at the time.'



"MR. WHELAN: That is right, your Honor.

"THE COURT: And I suppose also that includes the defense, so far as the conspiracy is concerned, because conspiracy was over a considerable period of time when Ballard was present, at least, within the area in which the conspiracy supposedly operated.

"You haven't disputed that; that the defense is also, "I did not do it. "

(Tr. pp. 3213, line 14 - 3214, line 8)

It is significant to note that the statement of the court to counsel assumes a conspiracy "because conspiracy was over a considerable period of time when Ballard was present . . . "

For the court to call upon Ballard to assume a position or a defense would be a denial of his constitutional rights in violation of the Fifth Amendment to the United States Constitution.

It is significant to note that Duke and Ballard were convicted as to Counts IV, V and VI, and Buono acquitted as to those counts. As to those counts, the evidence against Buono was equally as strong as that against Duke, the Government testimony showing that meetings allegedly took place in Buono's office with Buono present and participating.

This result certainly shows prejudice to Ballard by being required to go to trial with his co-defendants. Perhaps had he disavowed Duke's so-called special defense * (see footnote at end of this topic) and elected to adopt the position taken by Buono, he too might have been acquitted. Ballard should not have been called upon to join with either of his co-

defendants, nor should he have been called upon to take a position either contrary to or in conjunction with either of them. Ballard suffered from the prejudicial joinder as it was, and it is respectfully submitted that it was the duty of the trial judge to make every effort to eliminate any additional prejudice rather than force him, in the presence of the jury, to join with one of them.

A further illustration of the manner in which Ballard was prejudiced by denial of his motion for severance is as follows:

Before Ballard was ever heard of Spicuzza, Todd and Hadzima were smuggling psittacine birds. The first three counts of the indictment referred to a claimed situation testified to by Spicuzza, Todd, Hadzima and Helm to the effect that they had entered into an agreement between themselves and with Duke to smuggle birds. It is conceded that Ballard was no part of this alleged conspiracy or smuggling. Thereafter, Hadzima withdrew from that alleged agreement. Then came the Desert Center situation wherein it is claimed Ballard participated, referring to Counts IV, V and VI. Then came the conspiracy Count VII and the substantive Counts VIII, IX and X wherein it was claimed Buono advanced money to Helm to buy a plane and that Spicuzza and Todd were to smuggle birds with Helm flying them into this country from Mexico. With evidence from Spicuzza, Todd and Helm on these charges, it also

* Note: See Opening Brief of Appellant Clifford L. Duke, Jr. for review of proceedings and incidents occurring during the trial pertaining to this so-called special defense.

follows as a certainty that if Duke was guilty on all counts and Buono guilty on Counts VII, VIII, IX and X, that the jury would find Ballard guilty by association with his co-defendants charged in Counts IV, V and VI.

The testimony of witness Hadzima concerning a new conspiracy in July of 1953, between himself, Ballard and Duke, was improperly admitted.

The danger of mass trial has been announced and declared:

In Canella v. United States, 157 F. 2d 470, at 476, 477 we find the following:

"The theory of the trial court here and of the trial court in the Kotteakos case, was that all the evidence relating to all the separate spokes in the wheel was admissible against McCormac and Wyckoff and was relevant to the charge of a single conspiracy because of the general rule that when one joins an existing conspiracy, he 'takes it over as it is' and becomes liable for all that has gone before or may happen later. However, 'to bring this rule into operation it is not enough that, when one joins with another in a criminal venture, he knows that his confederate is engaged in other criminal undertakings with other persons, even though they be of the same general nature. The acts and declarations of confederates, past or future, are never competent against a party except in so far as they are steps in furtherance of a purpose common to him and them. Declarations * * * become competent only when they are uttered in order to accomplish the common purpose.'

"The view taken at the trial here, as in the trial of *Kotteakos v. United States*, 'confuses the common purpose of a single enterprise with the several, though similar, purposes of numerous separate adventures of like character.' 66 S. Ct. 1250."

And in *Canella v. U. S.*, *supra*, at Page 478:

"The instant case, with five conspiracies involving at least 12 persons, 'lies somewhere between' *Berger v. United States* and *Kotteakos v. United States*, and we are unable to say that 'prejudice to the substantial rights' of Wyckoff, and McCormac has not taken place. For even though here, as the Second Circuit Court of Appeals found in the *Kotteakos* case, the evidence concerning Wyckoff and McCormac disclosed that each shared in the fraudulent phase of the conspiracy in which they participated; and even though their convictions, had they been obtained in separate trials or on an indictment with separate counts, could not have been disturbed, it appears 'highly probable that the error (of mass trial) had substantial and injurious effects or influence in determining the jury's verdict.' 66 S. Ct. 1253."

V.

THE COURT ERRED IN ONE MATERIAL
INSTRUCTION PREJUDICIAL TO BALLARD.

"The defendant Ballard has offered some evidence of what we know in law as an alibi. An alibi is a circumstance of a person not being present at the time that an offense was committed. You should scrutinize the testimony of the persons

who told you that Mr. Ballard was in Santa Barbara at the time that certain prosecution witnesses said he was in some other place. Analyze it. And, of course, the burden is always upon the Government to show that the defendant is present at the place where he was supposedly committing the offense. "

(Tr. p. 5094, lines 15-24)(Emphasis added)

On pages 5113 to 5114, Volume 25 of the Reporter's Transcript the court, after completing his instructions, gave an instruction at the request of Appellant which may have, in a sense, somewhat toned down the objection to the instruction complained of -- but can it be said when the jurors heard the instruction of the court stating that the jurors should scrutinize the testimony, they did not reach the conclusion that these alibi witnesses were unreliable?

EVIDENCE IMPROPERLY ADMITTED AGAINST BALLARD

On or about February 10, 1953 Appellant was arrested by Deputy Sheriff Thomas E. Johnson, of San Diego County, first for speeding and suspicion, and then turned over to United States Customs officers because he had crates of parakeets in his truck. He was later released and not prosecuted and his parakeets returned after a conference with Customs Inspector Rae Vaeder and Assistant United States Attorney Morris Sankary.

Appellant objected to the introduction of this evidence because not charged in the indictment and because of failure of Government to furnish a bill of particulars. Also, because no showing of any unlawful conduct in the situation on part of Appellant.

Hearsay evidence was introduced over objection of Appellant, because it was not charged in the indictment and because of failure of the Government to furnish a bill of particulars, to show that one George Monolias, who it is said, was smuggling psittacine birds for Hadzima, Spicuzza and Todd, was hijacked and beaten up, and the birds taken. The circumstances would leave an inference that Ballard was one of the robbers. Monolias was not called as a witness. This incident was supposed to have occurred early in March, 1953 in Riverside County, California.

Evidence was introduced by John W. Hadzima to the effect that in July, 1953, after a dissolution of the partnership he claimed with Duke, Buono,

Helm, Pursselley and Ballard, because he claimed Pursselley was untrustworthy, that he told Duke that there was a new partnership and that he and Ballard were going alone to smuggle birds; that if Duke would care to join them he could have ten per cent of the profits and that Hadzima and Ballard would have 45% each. The objection was that this was outside of the scope of the charge in the indictment, and because of failure of the Government to furnish a bill of particulars and because of evidence of a separate and new conspiracy.

Evidence on rebuttal which was improperly admitted over the objection of Appellant came from Fred M. Miller. (Tr. pp. 3666, et seq.) When an objection was made that the evidence was not rebuttal and should have been offered as part of the Government's case in chief, the court questioned the United States Attorney, who replied:

"MR. STEWARD: We couldn't anticipate an alibi witness, an alibi defense."

(Tr. p. 3671, lines 11-12)

In appellant Ballard's opening statement made August 4, 1955, two weeks and one day prior to the Government resting its case, appellant stated that he expected to prove that on May 13, 1953, the key date when Spicuzza, Curtis, Hadzima and Helm said the robbery at Desert Center occurred, that he was in Santa Barbara hours away from Desert Center in Riverside County.

(Tr. pp. 100-101; App. 161-62)

The testimony of the witness Charles J. Springman (Tr. pp. 3708-16) from the Motor Vehicle

Department of California, and the testimony of Marvin W. Crump (Tr. pp. 3717-23) was admitted in evidence over the objection of Ballard on the grounds of being incompetent, irrelevant and immaterial, and not rebuttal.

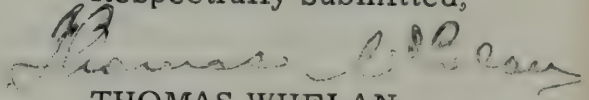
The testimony of the witness Giger (Tr. pp. 3995, et seq.) concerning a registration card of a motel in Indio, California, on May 12, 1955 was objected to as incompetent, irrelevant and immaterial, and not rebuttal.

The testimony of Miller, Springman, Crump and Giger would have been admissible in the Government's case in chief, but actually rebutted no evidence offered in Ballard's defense.

CONCLUSION

For the reasons herein stated, it is respectfully urged that the judgment of conviction and order denying new trial be reversed.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Thomas Whelan", is written over the printed name.

THOMAS WHELAN

Attorney for Appellant Ballard

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

THOMAS WHELAN, being first duly sworn,
deposes and says:

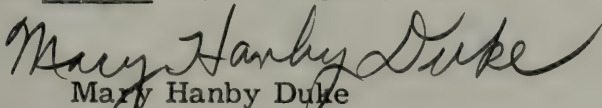
That he is a citizen of the United States, an attorney at law licensed to practice in the County of San Diego, State of California with offices at 413 Orpheum Theatre Building, San Diego, California; that he is over the age of eighteen years and is not a party to the above entitled action;

That on August 20, 1956, he deposited three copies of Appellant's Opening Brief on behalf of Louis Glenn Ballard, Docket Number 15146, in the United States mail at San Diego California, in a parcel bearing the requisite postage, addressed to MR. HARRY STEWARD, Assistant United States Attorney, 325 West "F" Street, San Diego, California, his last known address, at which place there is regular communication by United States Mail.



THOMAS WHELAN

Subscribed and sworn to before me
this 20 day of August, 1956.



Mary Hanby Duke

Notary Public in and for the
said County and State.

My commission expires June 11, 1957

(Seal)

No. 15146.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

CLIFFORD L. DUKE, JR., LOUIS GLEN BALLARD, and VIC
BUONO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF ON BEHALF OF

APPELLANT CLIFFORD L. DUKE, JR.

BARTON C. SHEELA, JR.
GEORGE WILLIAMS RUTHERFORD
CLINTON F. JONES

617 Bank of America Building
San Diego 1, California

Attorneys for Appellant
Clifford L. Duke, Jr.

FILED

AUG 21 1956

PAUL P. O'BRIEN, CLERK

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- A. By reason of Article V & Article VI of the Amendments to the United States Constitution and the decisions of the courts thereunder an accused in a Federal criminal case has an absolute right to effective assistance of counsel which includes the right to act as one's own counsel.

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- B. By reason of the rulings of the trial court prior to the commencement of any proceedings in the presence of the jury Duke was denied the right to proceed as his own counsel and by reason thereof his judgment is void.

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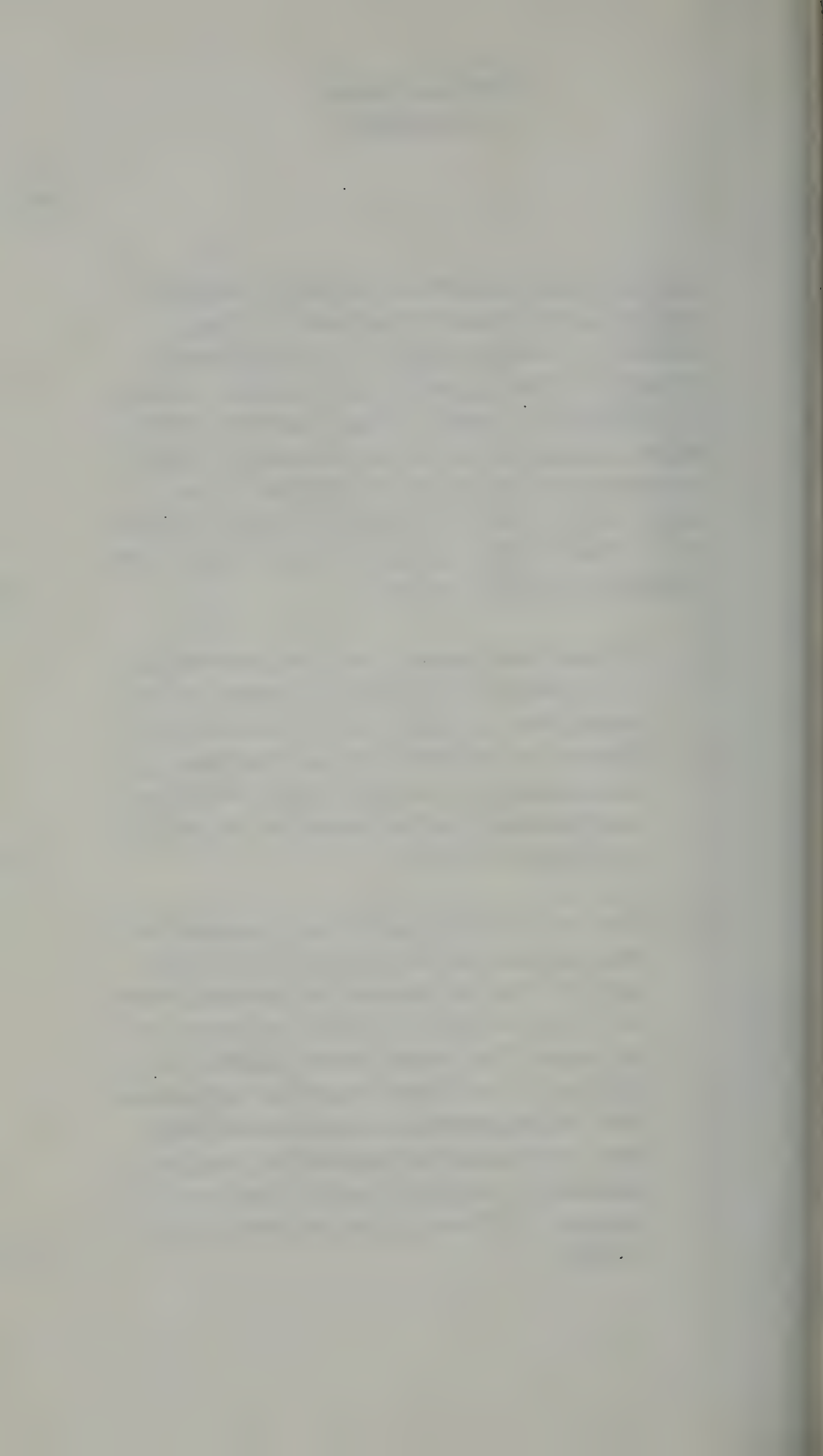
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A. It was misconduct for the prosecuting attorney to call a witness to the stand not to elicit any material evidence but solely for the purpose of disclosing to the jury that Duke had subpoenaed the witness but failed to call him to testify.

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B. The prosecuting attorney committed misconduct during argument to the jury in that he stated facts concerning Duke which not only were not in evidence but which were known by him not to be true, and the argument was intemperate and inflammatory and calculated to cause the jury to substitute passion and prejudice for reason in viewing the evidence as to Duke.

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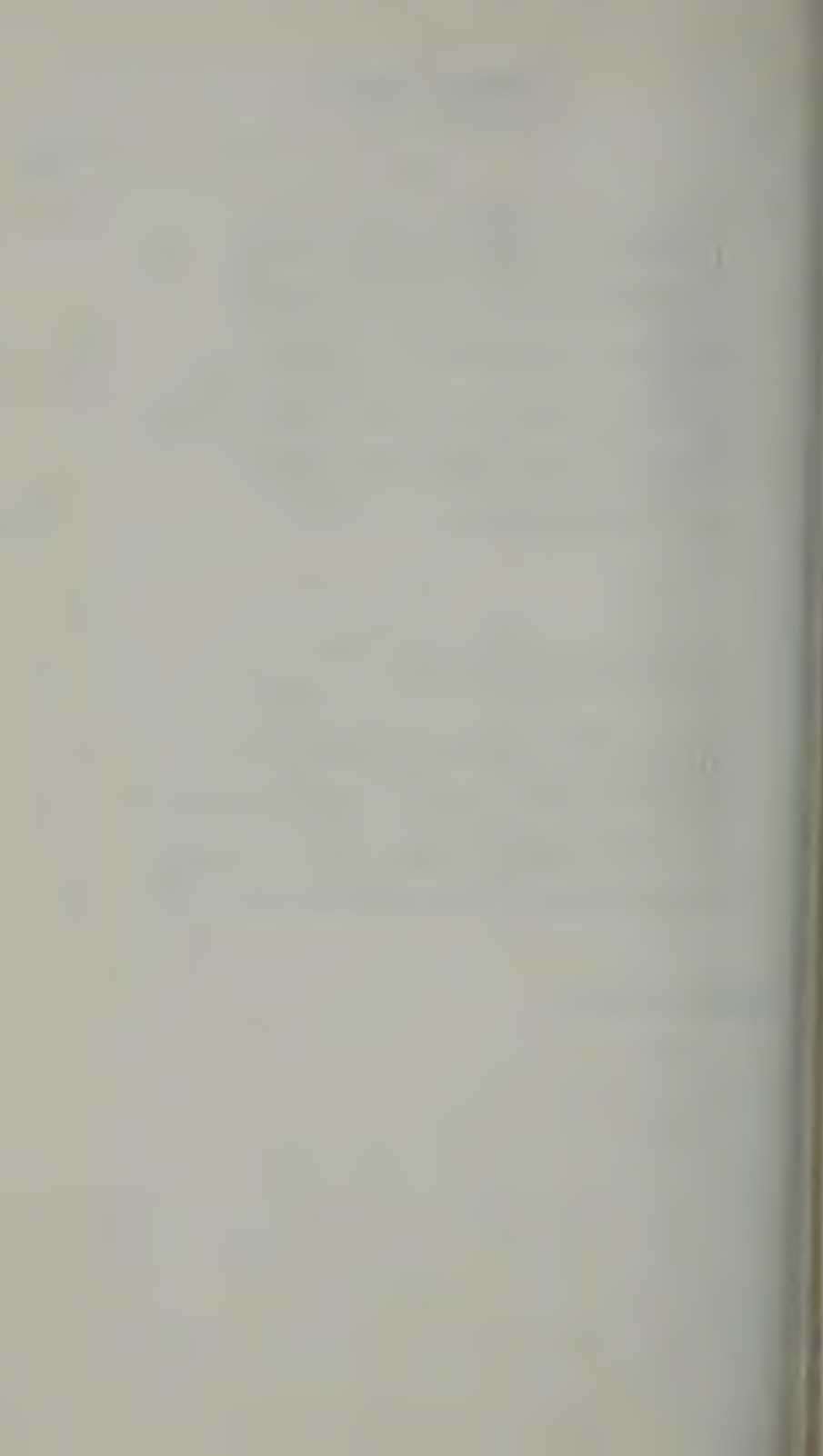


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PREFACE

This is the opening brief on behalf of Appellant Clifford L. Duke, Jr. Two other appellants in the same matter, Louis Glenn Ballard and Vic Buono, have filed separate briefs.

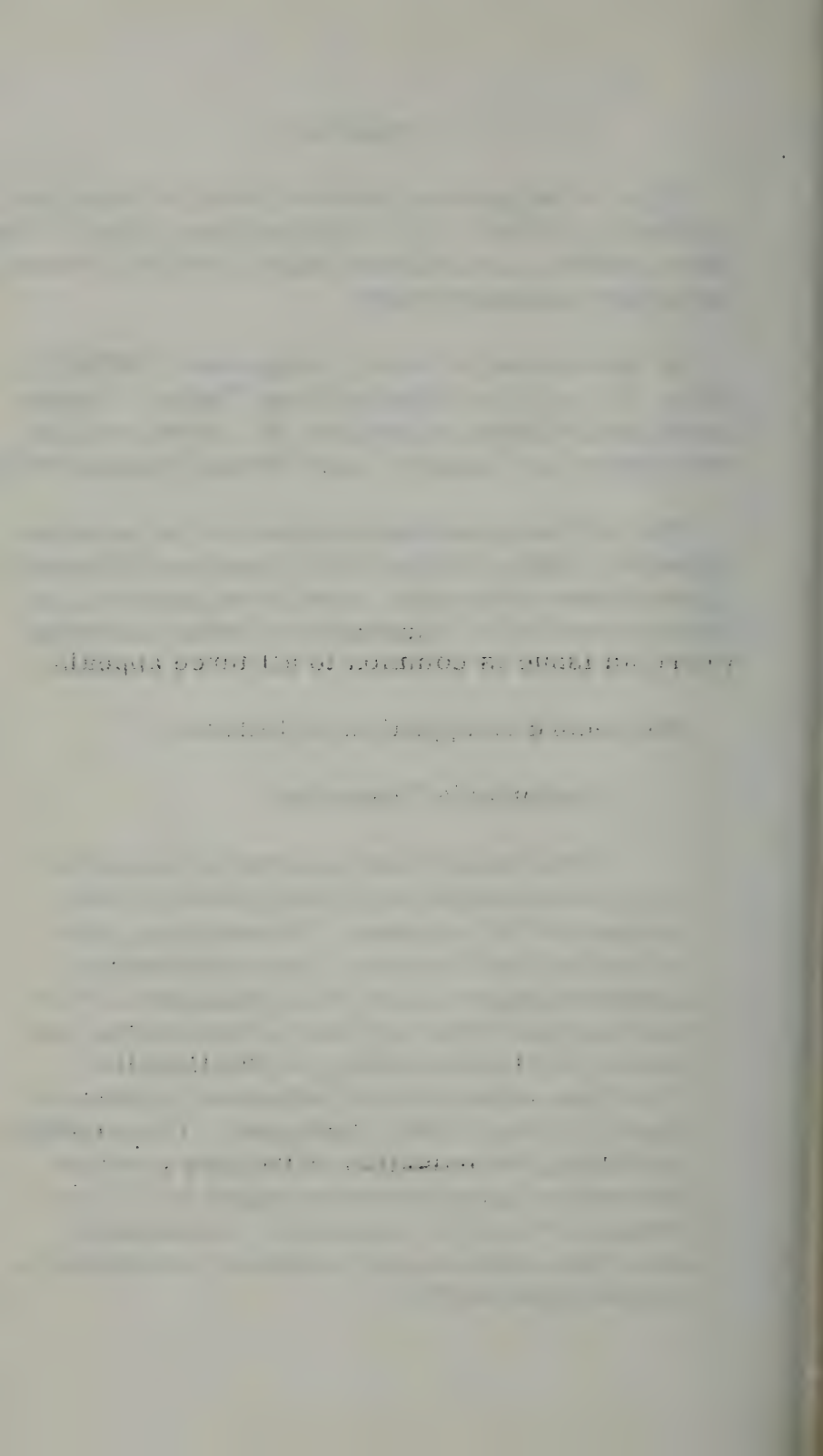
In the interest of brevity Appellant Clifford L. Duke, Jr. will be referred to as "Duke". Appellants Louis Glenn Ballard and Vic Buono will be referred to as "Ballard" and "Buono" respectively

Most of the questions involved in the separate appeals of Duke, Ballard and Buono are different. Counsel have attempted, insofar as possible, to avoid repetition of arguments in those instances where an issue is common to all three appeals.

The record on appeal is as follows:

1. Reporter's Transcript

The typewritten reporter's transcript of all proceedings had in the District Court consists of 35 volumes. Proceedings prior to date set for trial are in one volume and numbered pages 1A to 146A, inclusive. Proceedings had from the date of trial to the conclusion of all proceedings in the District Court are reported in 33 volumes, numbered pages 1 through 5349, inclusive. Proceedings had during the selection of the jury are in a separate volume numbered pages 36, 36-A-1 through 36-A-171, inclusive. Citations to any of the above named reporter's transcripts will be cited as (Tr.)



2. Clerk's Transcript

The typewritten clerk's transcript contains copies of all pleadings and papers on file and the clerk's minutes of proceedings below. This transcript is in one volume and numbered pages 1 through 378, inclusive. References to the clerk's transcript will be cited as (Cl. Tr.)

3. Exhibits

The record includes all original exhibits in evidence or offered in evidence in the trial court. References to the exhibits will be cited as follows:

- (a) Government's exhibits: (G. ex. 1, etc.)
- (b) Duke's exhibits: (D. ex. A, etc.)
- (c) Ballard's exhibits: (Ba. ex. A, etc.)
- (d) Buono's exhibits: (Bu. ex. A., etc.)

Because of the voluminous record on this appeal counsel for Duke and Ballard have prepared a joint Appendix to their respective briefs, consisting of verbatim excerpts from the official record without editorial comment.

Counsel endeavored to include in the Appendix all portions of the official record that might have even a remote bearing on the various questions presented in these appeals and have not intended to omit any portion that might be material to the Appellee. Attempting to make certain of this some portions of the record of doubtful materiality have been included.

The Appendix is arranged in chronological order and includes portions of the clerk's transcript as well as the reporter's transcript. It is submitted solely for whatever aid it might be in conserving the time of the Court in reviewing a six thousand page record.

The Appendix is not an additional brief, nor is it in lieu of any portion of the briefs, and should be used only if this Honorable Court deems it of any utility; otherwise, it should be disregarded.

References to the Appendix will be cited as (App. Vol. ___, p. ___). However, all citations to the Appendix will include a citation to the official record.

No. 15146

IN THE

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FOR THE NINTH CIRCUIT

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OPENING BRIEF ON BEHALF OF
APPELLANT CLIFFORD L. DUKE, JR.

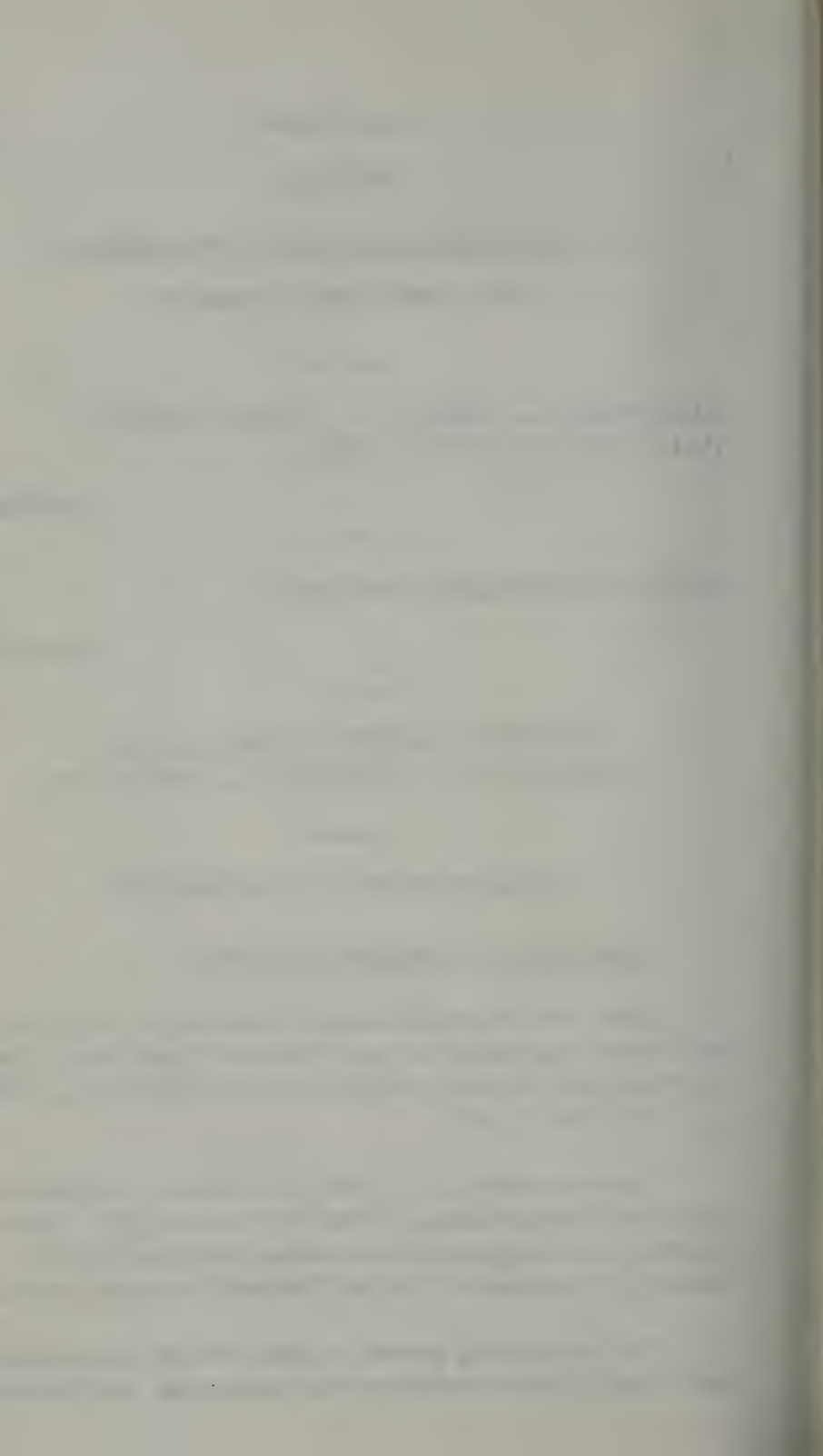
JURISDICTIONAL STATEMENT

A. Jurisdiction of the District Court

Duke was charged in each count of a ten count indictment returned by the Federal Grand Jury for the Southern District of California on May 25, 1955.
(Cl. Tr. p. 2)

Three counts (I, IV and VII) charge a violation of United States Code, Title 18, Section 371, conspiracy to smuggle merchandise into the United States in violation of United States Customs Laws.

The remaining seven counts charge smuggling and illegal importation or the receiving, concealing



and facilitating the transportation after illegal importation of merchandise in violation of United States Code, Title 18, Section 545. The merchandise referred to in each count is stated to be birds of the psittacine family.

(Cl. Tr. pp. 2-13)

Each of the ten counts alleged that the offenses charged were committed in the Southern District of California, Southern Division. The District Court, therefore, had jurisdiction of the cause by reason of United States Code, Title 18, Section 3231 which confers on the District Court original jurisdiction of all offenses against the laws of the United States.

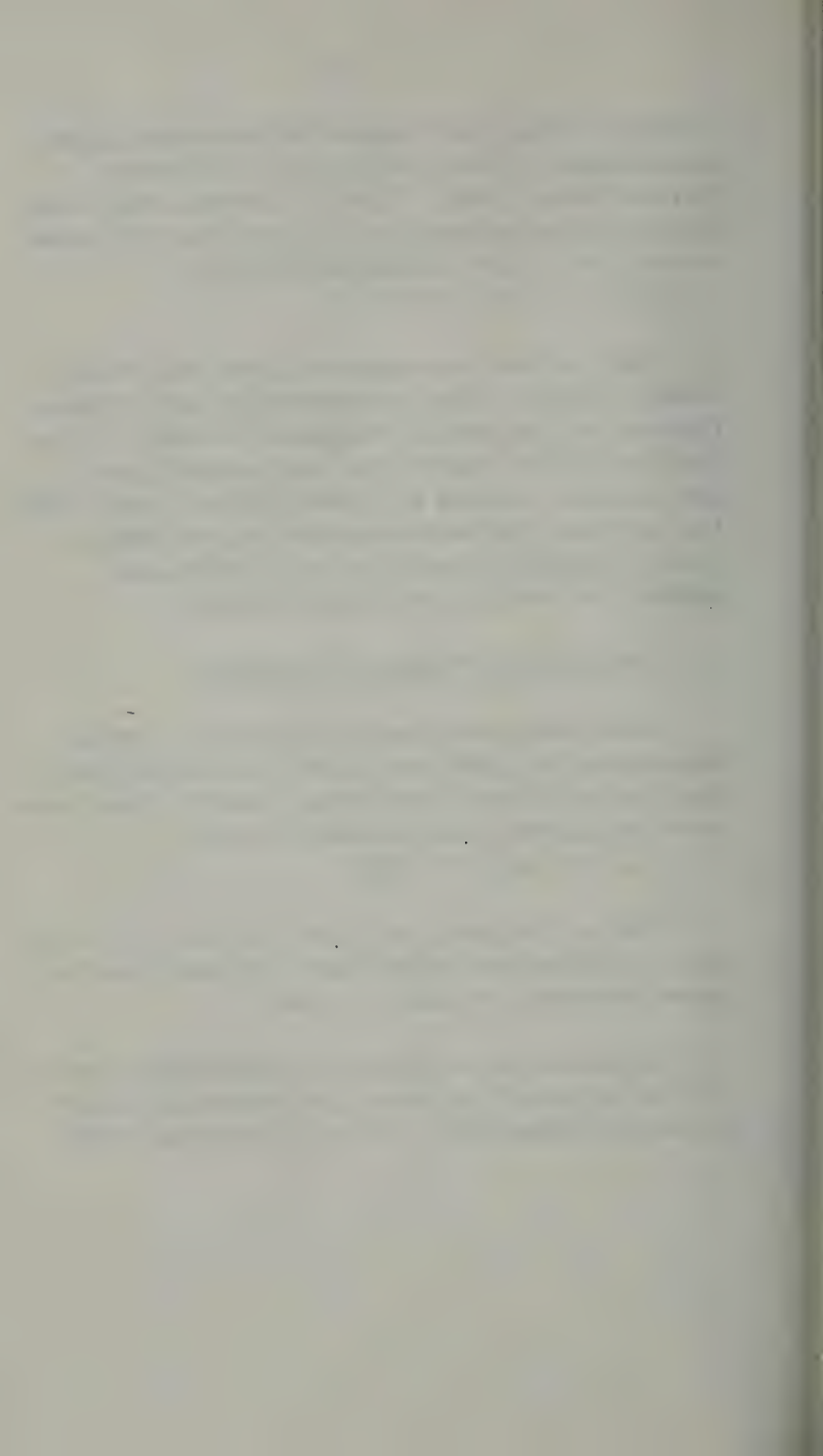
B. Jurisdiction of Court of Appeals

Duke was convicted of all counts, and on September 30, 1955 the court pronounced judgment on each count sentencing Duke to imprisonment for a total term of eleven years.

(Cl. Tr. pp. 311-312)

Notice of appeal was filed October 10, 1955, and the record on appeal was duly filed and the cause docketed on June 1, 1956.

Jurisdiction to review the judgment of conviction is conferred upon this Honorable Court by United States Code, Title 28, Section 1291.



STATEMENT OF THE CASE

The Indictment

Count I (18 U. S. C. 371)

Commencing in January, 1953 and continuing to April, 1953 Duke conspired with thirteen persons named as unindicted co-conspirators in violation of United States Code, Title 18, Section 371. The offense, the commission of which was stated to be the object of the conspiracy was to smuggle into the United States psittacine birds which should have been invoiced and to fraudulently import, and to receive, conceal, sell and transport after importation said psittacine birds, contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof.

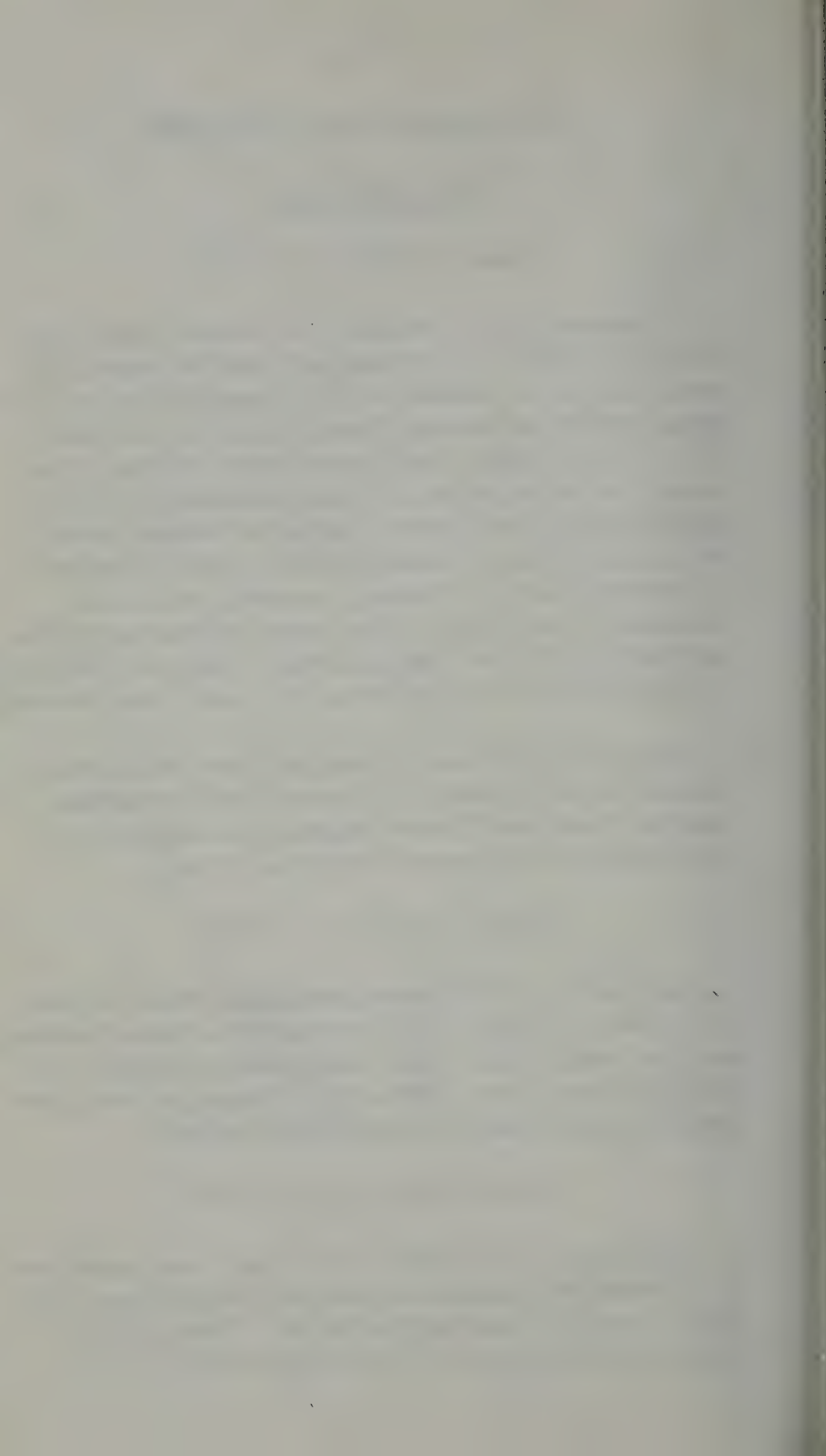
Among the thirteen unindicted co-conspirators named were Nicholas Spicuzza, John Hadzima, George Todd and Robert Helm, who testified as Government witnesses during the trial.

Count II (18 U. S. C. 545)

On April 1, 1953 Duke smuggled thirty crates of psittacine birds which should have been invoiced and that said birds were imported in violation of United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof.

Count III (18 U. S. C. 545)

On April 1, 1953 Duke received, concealed and facilitated the transportation and concealment of thirty crates of psittacine birds. (Same birds mentioned in Count II) with knowledge they had



been imported contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof.

Count IV (18 U. S. C. 371)

This count charged a conspiracy identical to the conspiracy charged in Count I; the only difference being the dates, parties charged and the number of unindicted co-conspirators and overt acts. The differences are as follows:

(a) Dates - Commencing on or about April, 1953 and continuing to December, 1954.

(b) Parties Charged - Duke, Ballard and Buono.

(c) Unindicted co-conspirators - Five persons named, among which were John Hadzima, Robert Helm and Mary Ascani.

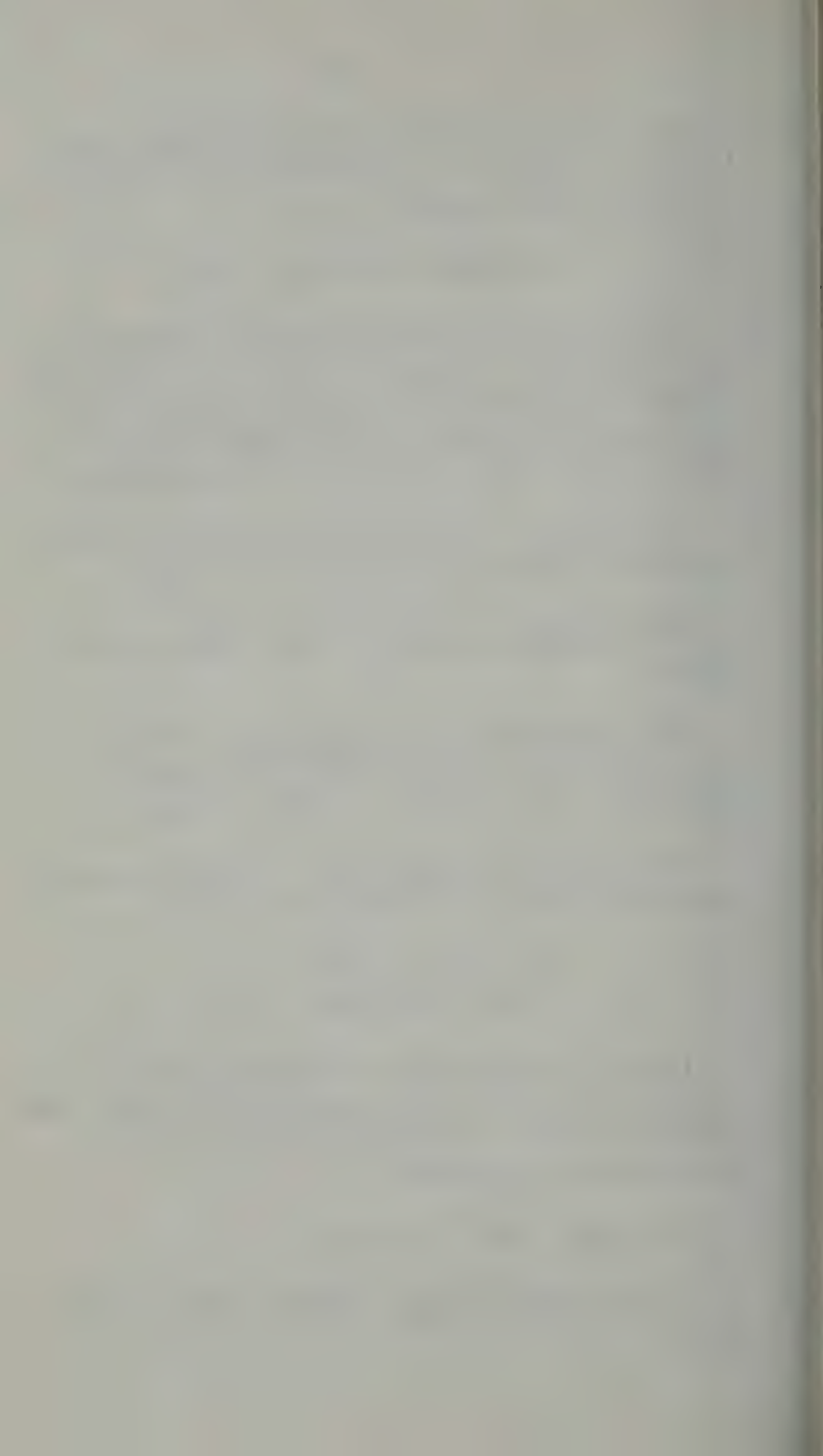
(d) Number of overt acts - Seven, the latest date of any overt act being June, 1953.

Counts V and VI
(18 U. S. C. 545)

Count V is identical to Count II and Count VI is identical to Count III, except for the date, and parties charged. In Counts V and VI the differences are as follows:

(a) Date - May 13, 1953.

(b) Parties Charged - Duke, Ballard and Buono.



Count VII (18 U. S. C. 371)

This Count charged a conspiracy identical to the conspiracies charged in Counts I and IV except for the dates, parties charged, unindicted co-conspirators and overt acts. In Count VII these differences are as follows:

(a) Dates- Commencing on or about June, 1953 and continuing to about October, 1953.

(b) Parties charged - Duke and Buono.

(c) Unindicted Co-conspirators - Four persons named, among which were Nicholas Spicuzza, Robert Helm and George Todd.

(d) Overt Acts - Six in number, the latest date of any overt act alleged being September 28, 1953.

Counts VIII, IX and X
(18 U. S. C. 545)

These Counts charge that Duke and Buono smuggled various and sundry psittacine birds into the United States which should have been invoiced and that in each instance said psittacine birds were imported contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof. Each of said counts are identical except for the dates which are as follows:

(a) Count VIII - on or about June 25, 1953.

(b) Count IX - on or about August 28, 1953.

(c) Count X - on or about September 28, 1953.

The offense, the commission of which was stated to be the object of each of the three conspiracies charged in Counts I, III and IV, purported to be an offense proscribed by United States Code, Title 18, Section 545.

Each of the remaining seven Counts, II, III, V, VI, VIII, IX and X, inclusive, purported to charge a violation of United States Code, Title 18, Section 545.

QUESTIONS INVOLVED

(Questions concerning specific provisions of the Constitution of the United States)

1. Was Duke deprived of the right to be represented by counsel contrary to the provisions of Article V and Article VI of the Constitution of the United States?

2. By reason of the provisions of Article V and Article VI of the United States Constitution, does an accused in a criminal trial have a right to act as his own counsel?

(a) Is the right absolute or subject to the trial court's discretion?

(b) In electing to act as his counsel, was Duke exercising a right that was absolute, or was it subject to the discretion of the trial court?

(c) If discretionary, was it an abuse of discretion and error for the trial court to deny Duke's request made at the inception

of the trial to act as his own counsel?

(d) If error, was Duke substantially prejudiced and deprived of a fair trial by reason thereof?

3. If an accused is an attorney and his trial is had in a Federal court before which he is admitted to practice, does he forfeit his right to have the assistance of co-counsel when he elects to represent himself?

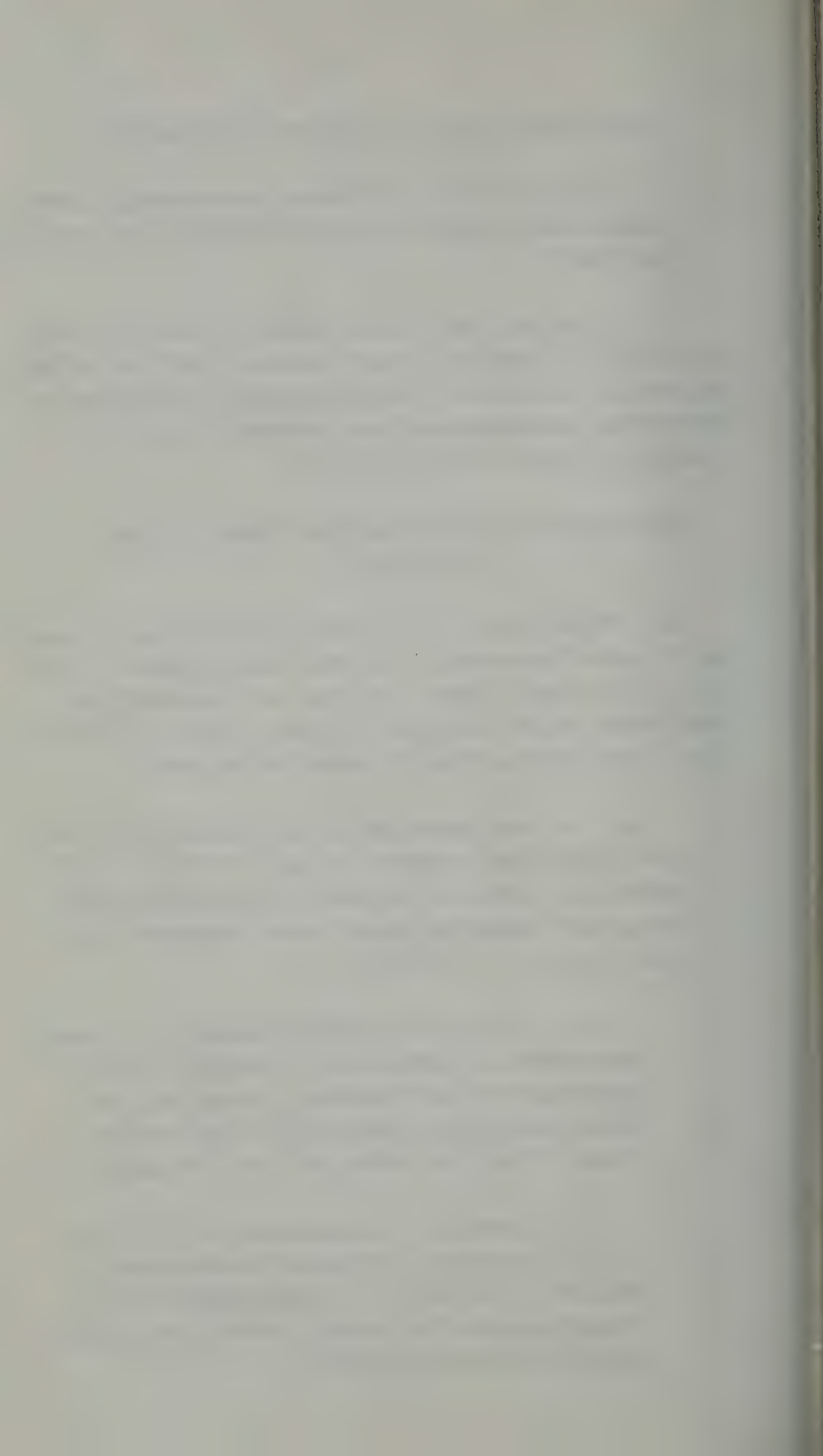
(Questions concerning the construction of Statutes)

4. When there are several laws which punish as crimes the same act, one being general and the others being specific, can an accused be punished under the general law which provides for a greater period of penal servitude?

(a) Is the importation of psittacine birds punishable as a felony under 18 U. S. C. 545, which is a general statute prohibiting smuggling and importation of merchandise contrary to law in view of

(1) a specific statute making it a misdemeanor to import or transport birds, animals or fish contrary to any act of Congress or in violation of the regulations of the Secretary of the Treasury;

(2) a specific regulation (42 C. F. R. 71. 152) enacted pursuant to statutory authority (42 U. S. C. 264) making it a misdemeanor to import psittacine birds into the United States?



(b) In view of the specific laws pertaining to psittacine birds above mentioned, was it error for the court to assess punishment on the conspiracy charges in excess of that permitted by the second paragraph of 18 U. S. C. 371?

5. With respect to Counts II, III, V, VI, VIII, IX and X (the substantive counts) of the indictment, do the allegations that merchandise was imported into the United States in violation of United States Code, Title 19, Chapter 4, and particularly 1461 and 1484 thereof state facts sufficient to constitute an offense against the United States?

(Questions concerning the rulings of the Court and conduct of the prosecuting attorney)

6. When a proper foundation has been laid therefor, is evidence admissible which tends to prove that a Government witness had a corrupt motive in testifying; and if the court precludes the laying of such foundation on cross-examination and directs a defendant to prove such matters affirmatively in his defense, is it error to then reject such proof when offered affirmatively by the defendant?

7. Did the court err in refusing to admit evidence, tending to prove that during a specific period Duke was heavily in debt and compelled to borrow funds from the bank to meet current expenses, to rebut the testimony of a Government witness that he had paid Duke fabulous sums of money during the same period?

8. Did the court err in refusing to admit evidence tending to prove that just prior to the

trial a Government witness was engaged in illegal conduct in violation of United States laws for which he had not been prosecuted?

9. Was it error to permit a Government witness to consult with his attorney during cross-examination before answering questions concerning matters about which he testified on direct?

10. Did the court err while instructing the jury in:

(a) Refusing to give a requested interim instruction concerning the weight which the jury should give inferior evidence?

(b) Commenting that strong suggestions had been made by some counsel that some of the Government witnesses had conspired together and the jury should consider such accusation and consider what access witnesses in the penitentiary had to one another?

(c) Refusing to give requested instruction to the effect that the testimony of an accomplice must be corroborated?

11. During argument to the jury was it misconduct for the prosecutor to:

(a) Deliberately make an inflammatory argument upon a subject which had been excluded from evidence?

(b) Make derogatory and inflammatory factual statements about a defendant which were not only outside the evidence but which

which the prosecutor knew were not true.

(c) Express his personal belief concerning the guilt of the defendant?

In the circumstances of this case did such acts of misconduct substantially prejudice Duke and deprive him of a fair trial?

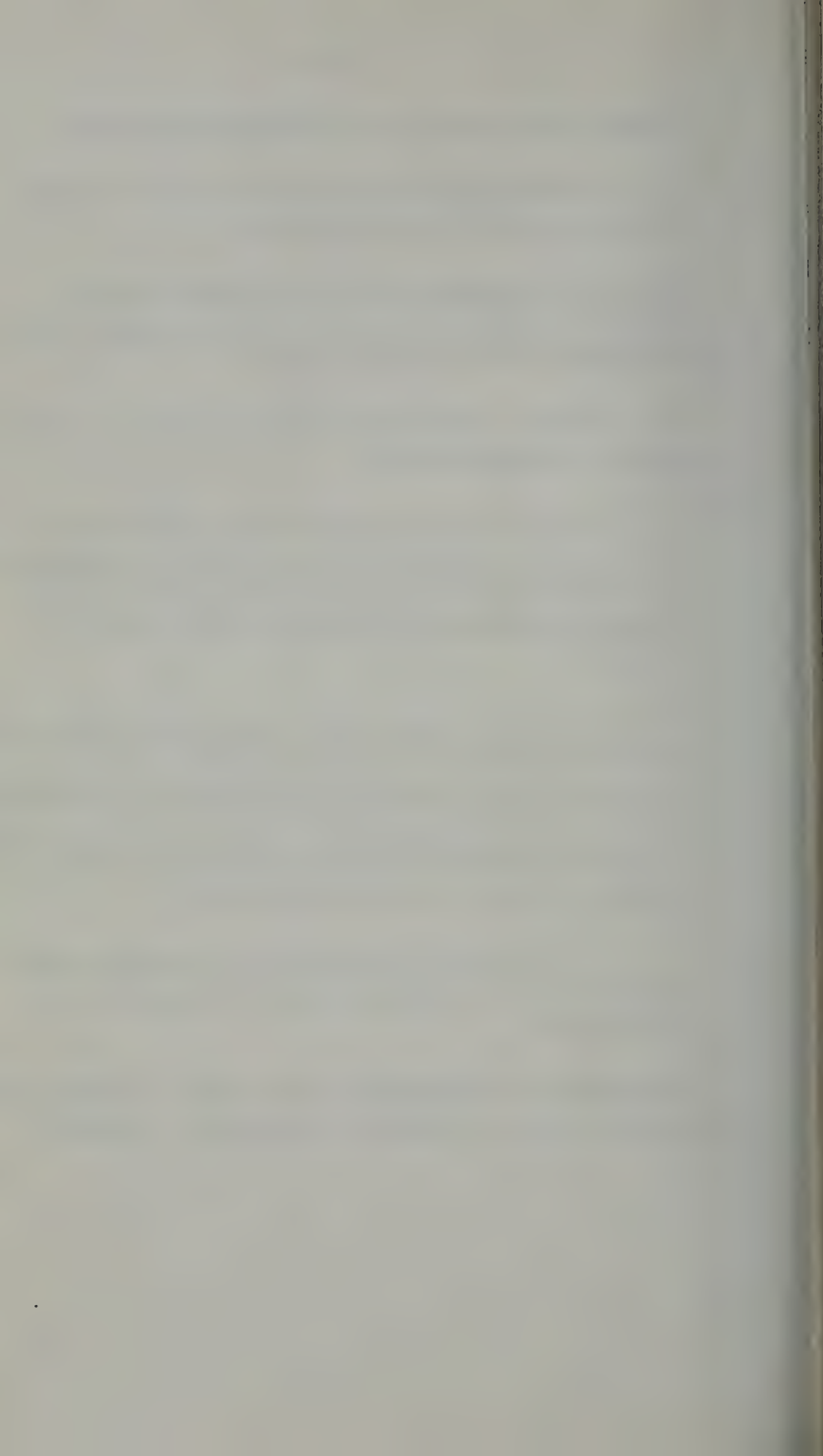
12. Was it misconduct in the presence of the jury for the prosecutor:

(a) To call a witness to the stand not to illicit any evidence but solely for the purpose of disclosing to the jury that the witness had been subpoenaed by Duke but not called to testify?

(b) While cross-examining Duke to assume by his question the existence of facts concerning which no evidence was offered or attempted the question being asked solely for the purpose of getting before the jury derogatory and prejudicial matter concerning Duke?

(c) To make statements prejudicial to the defendant when interposing an objection to evidence?

Was Duke substantially prejudiced and deprived of a fair trial by reason of the above conduct?



MANNER IN WHICH QUESTIONS RAISED ON APPEAL

The questions (1, 2 & 3) concerning deprivation of right to counsel in violation of the United States Constitution was raised as follows:

1. Prior to trial statements and requests made by Duke in the court's chambers. (Tr. 28)
2. Specific motion made and denied after the selection of the jury, but prior to any proceedings in their presence. (Cl. Tr. 110)
3. Motion for new trial. (Cl. Tr. p. 289)

The questions (4 & 5) concerning the construction of Statutes were raised as follows:

1. Timely motion to dismiss indictment which was denied. (Cl. Tr. p. 28 & 68)
2. Motion in arrest of judgment which was denied. (Cl. Tr. p. 204)

The questions (6, 7, 8 & 9) concerning the rulings of the court during examination of witnesses and in admitting or rejecting evidence were raised in each instance by specific questions asked and detailed offers of proof after which the court ruled the evidence inadmissible.

Question 6 -- (Tr. pp956-957; App. 242-243)
(Tr. 2657-2659; App. 452-454) (Tr. p. 3361; App. 504-505) (Tr. 3366-3367; App. 508) (Tr. 3372-3373; App. 512) (Tr. 3378-3388; App. 515-520) (Tr. 3391-3392; App. 52;

(Tr. 3398-3448; App. 525-548) Tr. 3517-3531; App. 553 - 558) (Tr. 3581-3585; App. 565-570) (Tr. 4280; 4291; 4296-4298; App. 649-652)

Question 7 -- (Tr. 3294-3297; App. 488-492)

Question 8 -- (Tr. 2166-2173; App. 395-402) (Tr. 2181-2225; App. 403-430) (Tr. 4108-4114; App. 632 - 637)

Question 9 -- (Tr. 931-934; App. 237-239)

The questions (10) concerning the court's instructions to the jury were raised by specific written instructions profered and refused, and in two instances, by exception taken, before the jury retired to deliberate.

Question 10 -- (Tr. 2374-2375; App. 440-441; see also Cl. Tr. 151; 154) (Tr. 5089-5090; App. 675-676) (Tr. 5108; 5110; App. 684-685)

Misconduct of the prosecuting attorney during argument to the jury (question 11) was raised by a specific assignment, and requested admonition.

Question 11 -- (Tr. 4433-4435; 4442; 4444-4445; 4451-4455; App. 657 - 670)

Misconduct of the prosecuting attorney during examination of witnesses and calling of a witness for improper purpose (question 12) was not specifically objected to but reviewable in connection with previous question in determining the cumulative effect of prejudice.

Question 12 -- (Tr. 2629; App. 452) (Tr. 2856;
App. 455) (Tr. 3011-12; App. 458-460)
(Tr. 3215-3217; App. 472 - 474) (Tr. 3295;
App. 489) (Tr. 3328-3330; App. 493-495)
(Tr. 3803-3818; App. 607-614)
(Tr. 4179-4183; App. 641-643)

SUMMARY OF PROCEEDINGS AND EVIDENCE

All proceedings were had in the United States District Court, Southern District of California, Southern Division at San Diego.

Proceedings Prior to Trial

1. Duke, Ballard and Buono were arraigned in the United States District Court, Southern District of California, Southern Division on June 3, 1955.

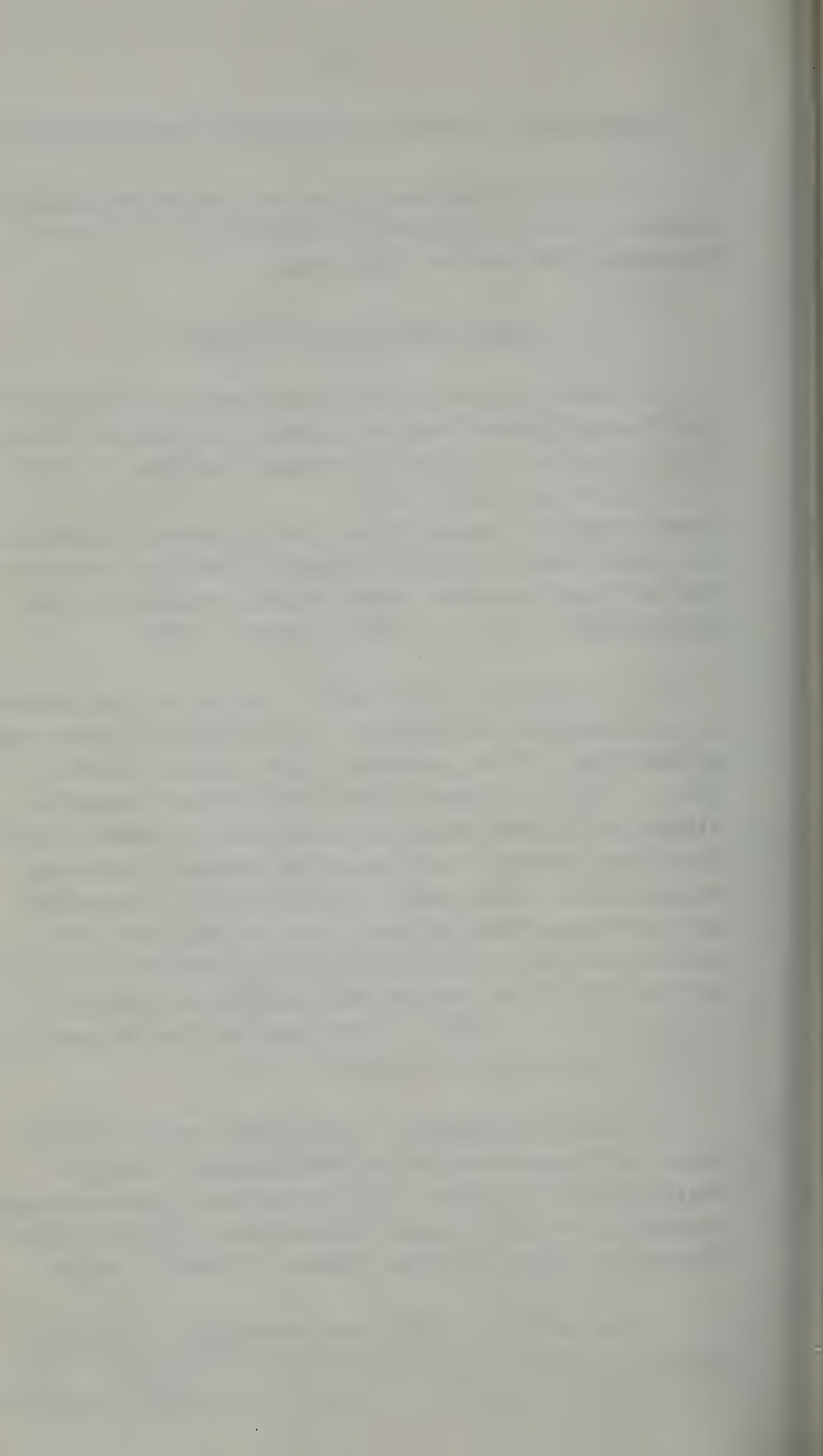
(Tr. pp. 2A - 35A)

Duke entered a plea of not guilty to each count in the indictment and was granted leave by the court to file written motions attacking the validity of the indictment. (Tr. p. 25A, lines 4 - 10)

2. On June 7, 1955 Duke filed a written motion to dismiss the indictment, together with points and authorities. The grounds of the motion were: first, that the counts of the indictment failed to allege sufficient facts to constitute a cause of action; and second, that unlawful conduct relating to psittacine birds was proscribed by a specific law and therefore did not come within the provisions of the general smuggling statute. (Cl. tr. pp. 28-30) The motion was denied on June 23, 1955. (Tr. p. 68A) Trial was set for August 2, 1955. (Tr. p. 85A, lines 11 - 12)

3. All proceedings to this point were had before the Honorable Jacob Weinberger, United States District Judge. All subsequent proceedings including the trial were had before the Honorable Ernest A. Tolin, United States District Judge.

4. On July 25, 1955 the Honorable Ernest A. Tolin, at a hearing in open court, continued the trial date to August 3, 1955. (Tr. p. 145A, lines 11-12)



5. At all stages of the proceedings to this point Duke appeared in propria persona.

(Tr. pp. 3A, lines 22-23; 36A, 56A, 129A)

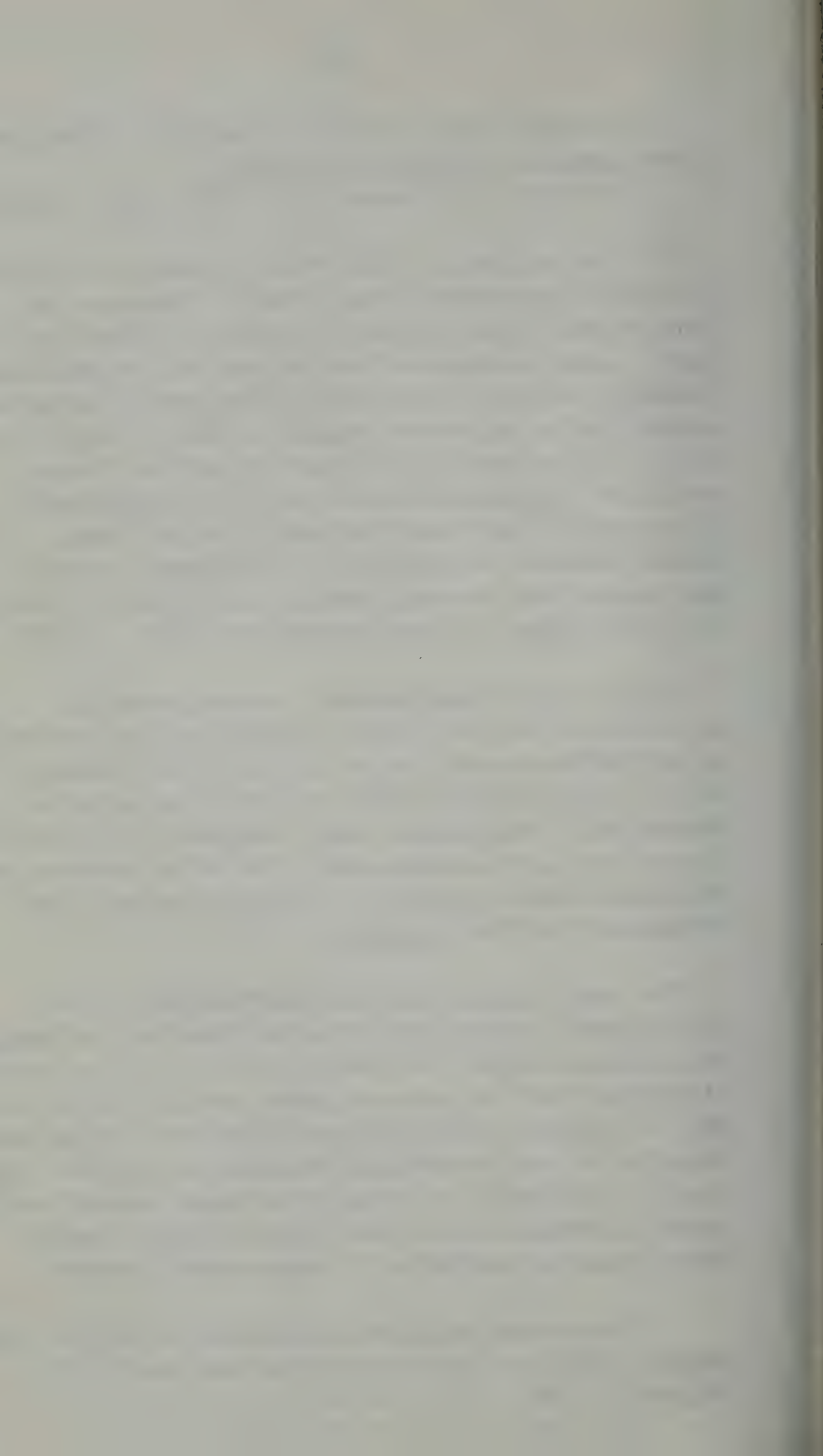
6. On August 3, 1955 prior to selection of the jury Duke appeared in the Judge's chambers accompanied by Clifford K. Fitzgerald, Attorney at Law. Duke announced that he desired to represent himself, and had brought Mr. Fitzgerald along to assist him in a limited capacity. Mr. Fitzgerald was not of record. The court stated that Duke could not represent himself and have assistance of counsel. The court further directed Duke to obtain counsel of record if he intended to testify and stated that he would not be permitted to testify and also argue the case to the jury. (Tr. p. 28)

After further discussion it was agreed that selection of the jury could proceed and the extent to which Duke would be permitted to participate would be determined after the jury was selected. Immediately thereafter court convened and selection of the jury commenced. Out of the hearing of the venire Duke moved for the association of Mr. Fitzgerald as his co-counsel. (Cl. Tr. 107)

The court again took the position that if Duke represented himself and also testified as a witness he could not argue the case to the jury. The court stated that for the reasons gone into in chambers, Mr. Fitzgerald could be associated with the understanding he was to conduct the case except for arguments on motions of law and the court would keep under submission until the following day whether Duke would be permitted to examine witnesses.

7. Upon completing the selection of the jury on August 3rd, they were sworn and excused until August 4, 1955. (Tr. p. 36)

(Tr. p. 36-A-2 to p. 36-A-3)



8. On August 4, 1955 prior to any proceedings in the presence of the jury, the court ruled that Duke would not be permitted to act in his own behalf in all proceedings, having moved the association of Mr. Fitzgerald. Duke excepted to the court's ruling and then requested that he at least be permitted to make an opening statement. Duke stated that he had fully intended to conduct his own case and that Mr. Fitzgerald had merely volunteered to assist in certain awkward situations; and that therefore, he, Duke, was the only one prepared to make his opening statement. The motion was denied. Whereupon, Duke moved the court for an order releasing Mr. Fitzgerald from the case. The motion was denied. (Tr. p. 40, line 23 - p. 45, line 20)

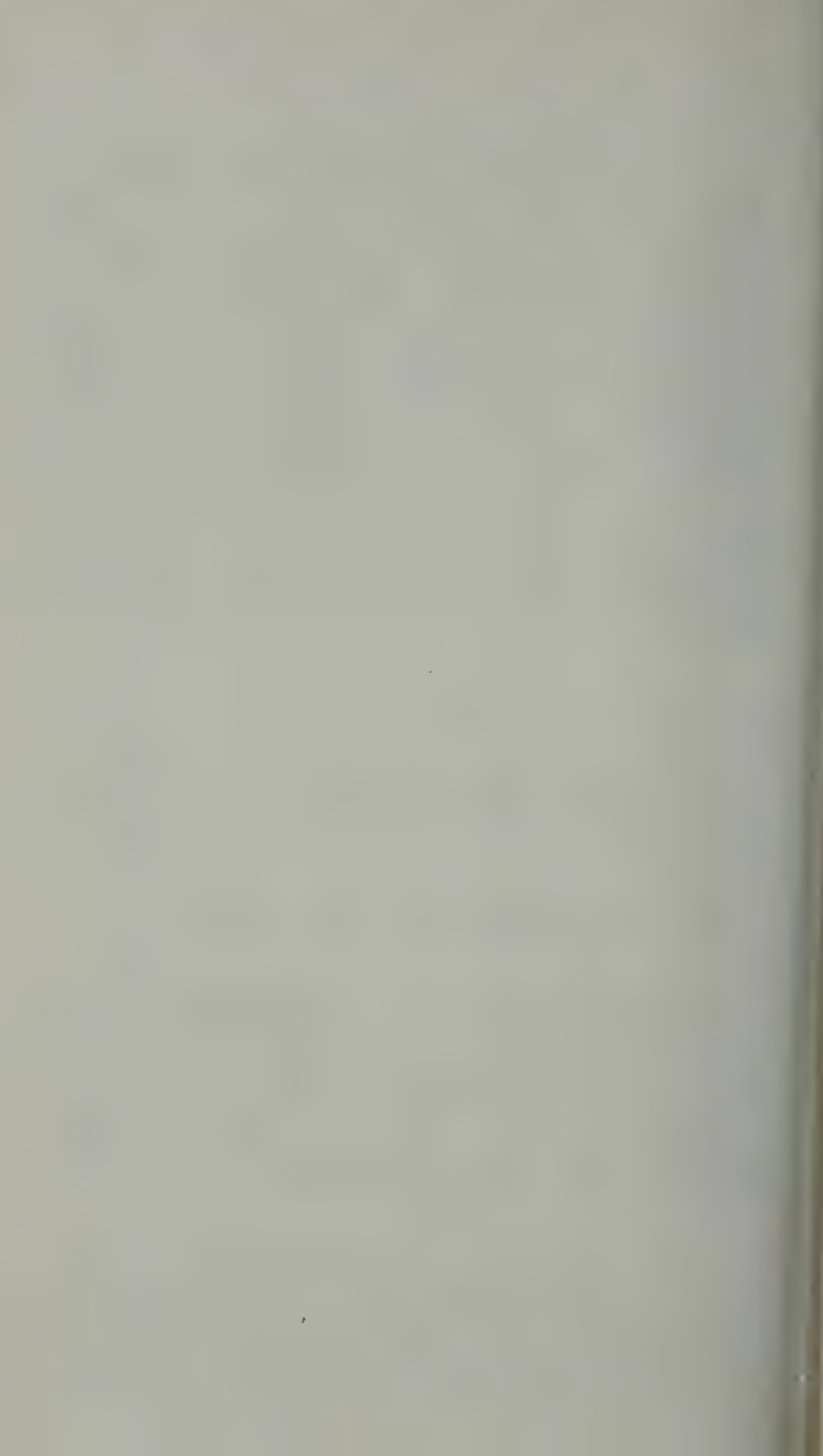
Proceedings at Trial

On August 4, 1955 the trial of Duke, Ballard and Buono commenced in the presence of the jury.

9. The Government's Case in Chief:

The prosecution's case in chief against Duke consisted of the testimony of six witnesses. They were either named as, or ruled by the court, to be, unindicted co-conspirators in one or more of the conspiracy counts. They were: Robert Helm, John Hadzima, Nicholas Spicuzza, George Todd, Mary Ascani and Raymond Curtis.

The witness Robert Helm was convicted for smuggling aliens in February, 1953 and given a fine and five year prison sentence, both of which were suspended. He was placed on pro-



bation for five years. Duke was his attorney.
(Tr. p. 1288, 1291 - 1292)

The witness John Hadzima was convicted of smuggling birds in 1950. In October, 1953 Hadzima, together with the witness Nicholas Spicuzza and the witness George Todd, and others, was convicted for conspiracy and bird smuggling. Spicuzza and Todd were each sentenced to prison for three years. Hadzima was sentenced to five years and fined \$5,000. Duke was the attorney for each of them in the 1953 trial.

(Tr. p. 374-75)

Hadzima, Spicuzza and Todd retained Duke to appeal their convictions and each was released on bail pending appeal. (Tr. p. 1566)

Thereafter, in December, 1953 Spicuzza and Todd arranged with Helm and a Leonard Warwick to smuggle birds from Mexico, which act they did in January, 1954. It developed that Leonard Warwick was a customs agent. As a consequence, Todd and Spicuzza were arrested, indicted and convicted after a second trial in

* Note: The appeal, Steiner vs. United States, C. A. 9th, No. 14512, was decided by this Honorable Court on January 23, 1956. Conviction was affirmed as to Count 1, conspiracy and reversed as to all substantive counts.

June, 1954, their first trial in April, 1953, having resulted in a hung jury. Duke was their attorney. Helm appeared in both trials and testified as a Government witness. Spicuzza and Todd were sentenced to prison for four years on the second conviction and were brought from the Federal penitentiary to testify against Duke, Ballard and Buono.

(Tr. pp. 248-249; 1552-53; 1600-04)

(Cl. Tr. pp. 73 and 75)

In 1954 three successive and superceding Federal indictments were returned against Hadzima. Duke appeared in court for Hadzima on several arraignments and motions involving these indictments, the last appearance being in Federal court in Los Angeles, March 22, 1955. Hadzima was never tried. After March 22, 1955 Hadzima substituted another attorney, Harold P. Lasher, in the place of Duke. These indictments were pending against Hadzima at the time he testified against Duke, Ballard and Buono in 1955.

(Tr. p. 877-888)

Mary Ascani testified as a witness for the Government in the case of U. S. vs. Steiner, et al., in 1953 at which time she had been held to answer and was awaiting trial in the Los Angeles County Superior Court for the crimes of burglary and grand theft, to which charges she had entered a plea of not guilty by reason of insanity.

(Tr. pp. 1796; 1799-1800)

According to Helm and Ascani, they had related to Customs officials as far back as

1953 some of the facts about which they testified in the present trial; and although they were named as unindicted co-conspirators in the Duke, Ballard and Buono indictment, neither had been charged with any Federal offense involving psittacine birds at the time they testified in 1955. (Tr. pp. 1132; 1801-02)

After Helm testified as a witness for the Government against Spicuzza and Todd in 1954 he was released from probation at the request of the Federal probation officer, concurred in by the Assistant United States Attorney in San Diego. (Tr. p. 1299)

Raymond Curtis was convicted of a Federal offense involving psittacine birds in September, 1953 and was on probation for that offense at the time he testified. (Tr. p. 604-606)

A seventh witness, Thomas E. Johnson, gave no testimony in any way concerning Duke or Buono.

Note: We do not believe it necessary to restate the testimony of the witnesses in detail. If the testimony of Spicuzza, Todd, Hadzima, Helm and Ascani is accepted as true, and if their testimony need not be corroborated, then Duke concedes there is sufficient evidence to justify an inference of guilt, having in mind the rule that this Court, on appeal, will not review conflicting evidence and will not draw inferences contrary to the jury's findings despite the fact that as a trier of fact this Honorable Court might have reached a different conclusion.

However, if the witnesses produced by the prosecution were of such character that the

jury would have been justified in rejecting their testimony in toto, then we believe that assignments of error, if there be any, assume more significance on appeal. Therefore, the matters outlined above concerning the prosecution witnesses are related solely for the purpose of demonstrating that but for the errors of law assigned herein, the jury might reasonably have rejected their testimony and reached a different conclusion.

Summary of the Evidence Pertaining to Counts I, II and III.

The first count of the indictment charged a conspiracy and named Duke as the sole defendant. The period of the conspiracy was alleged to be from January, 1953 to April, 1953. Counts II and III likewise charge Duke as the sole defendant and are substantive offenses concerning the actual smuggling and transportation of psittacine birds on April 1, 1953, which offenses were stated to be the object of the conspiracy charged in Count I. The witnesses giving testimony concerning these counts were Nicholas Spicuzza, George Todd, John Hadzima and Robert Helm, all named as unindicted co-conspirators in Count I.

In substance, the testimony of Spicuzza, Todd and Hadzima was to the effect that since early 1950 they, and others, had been working together in the smuggling of psittacine birds into the United States. That Hadzima had been arrested for bird smuggling in 1949 and again in 1950, and that upon a plea of guilty he was sentenced to thirty days in jail. (Tr. p. 700-704)

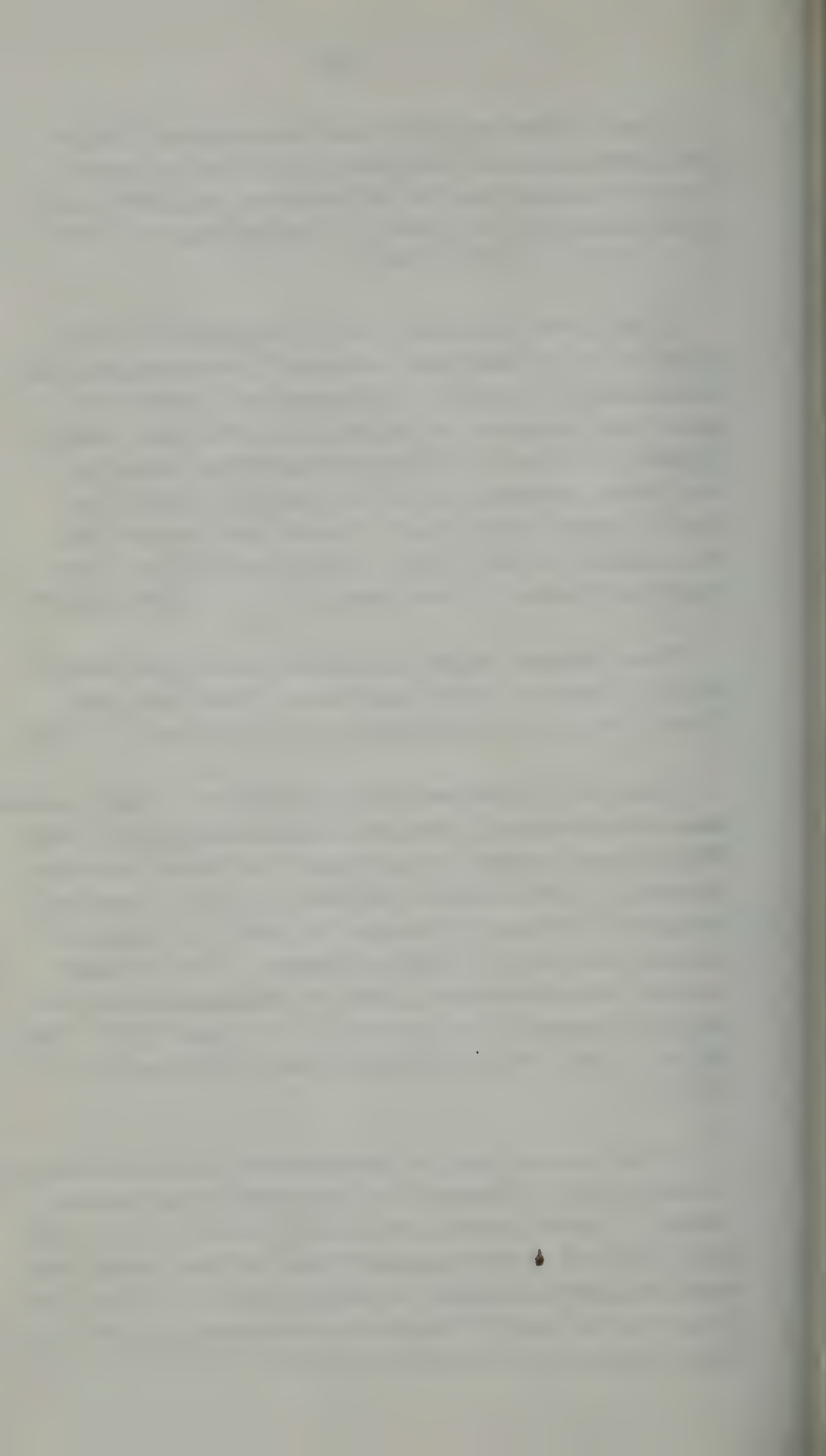
That Buono was and had been since 1949 a bail bondsman in San Diego and that as such became acquainted with Hadzima in 1949, and with Spicuzza and Todd in the Spring of 1952.
(Tr. p. 701 - 702)

That from October, 1952 through the latter part of 1953 Duke was retained to represent the Continental Casualty Company bail bond division with respect to litigation in the San Diego County courts involving the interpretation by the State authorities of the Federal Soldiers and Sailors Relief Act. Buono was one of the two agents in San Diego representing the Continental Casualty Company. (Tr. p. 2306-2307)

That Robert Helm was an aviator and was in no way involved with Spicuzza, Hadzima and Todd, or bird smuggling, until February, 1953.

That in the latter part of October, 1952, Helm was arrested and charged with smuggling aliens. That Buono posted a bail bond for Helm on this charge. Buono employed Duke at this time to prepare a property pledge for Helm to sign as security to the bonding company. As a consequence Helm retained Duke to represent him on the alien smuggling charge. (Tr. pp. 2307-2308) Helm's trial was eventually set for January 12, 1953.

In the meantime, in November, 1952 a Chester Vosburg was arrested for smuggling psittacine birds. Buono posted bond for Vosburg. On the day Vosburg was released from jail on bond Duke was in Buono's office in connection with the civil litigation in which Duke was representing the bonding company and was introduced to Vosburg. As a



result Duke was retained to represent Vosburg on bird smuggling charges. The matter was set for trial for January 23, 1953 in the San Diego Federal Court the same day as the Helm case had been set. At the time Vosburg was arrested he was working for Spicuzza, Todd and Hadzima.

Both Helm and Vosburg appeared in the same courtroom on January 12, 1953. The Vosburg case was tried first and the Helm case continued. (Tr. pp. 2339 - 2346) On January 14th Vosburg was acquitted by jury. (Tr. p. 62) On February 12th Helm was convicted on the alien smuggling charge by the court sitting without a jury. On February 27th Helm was given a five year sentence and fined. Both the fine and prison sentence were suspended and Helm was placed on probation for five years. (Tr. p. 2348)

Sometime after Vosburg was acquitted Spicuzza, Todd and Hadzima testified that they came to Duke's office to arrange payment of Vosburg's attorney's fees and at that time sought to retain Duke in the event they got into any trouble. Although they had known Buono for some time and he was apprised of their bird smuggling activities early in 1952, this was the first time any of them had met Duke. Hadzima places the date of this conference sometime about February 22, 1953, or after (Tr.p.902 963) while Todd and Spicuzza place the date as being sometime in January following Vosburg's acquittal.

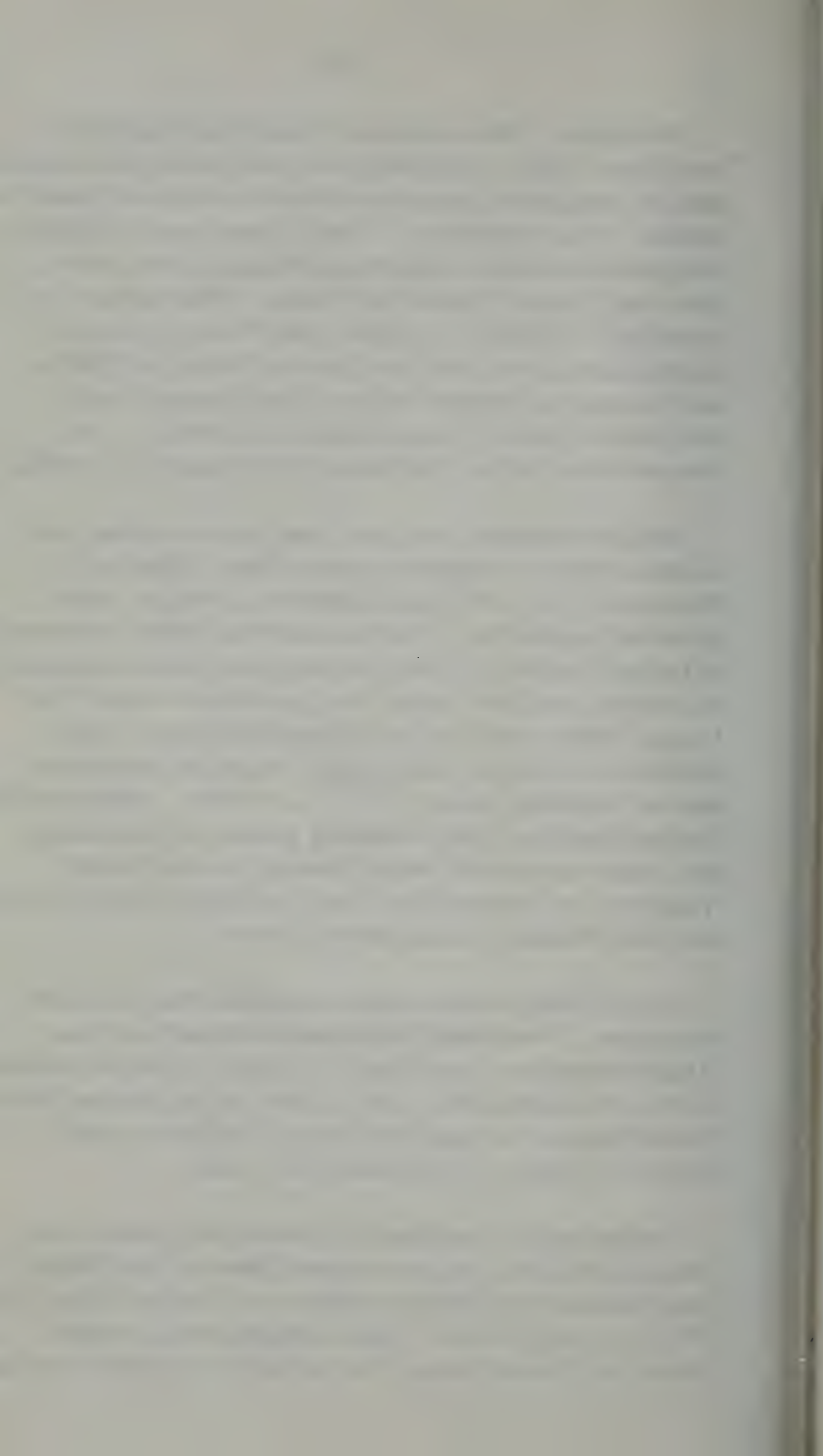
Hadzima, Spicuzza and Todd testified in substance that at this first conference in Duke's office Duke suggested that they start smuggling birds by airplane. That he, Duke, would introduce them to a pilot, (Helm) for that purpose. (Tr. p. 707, et seq)

Hadzima, Spicuzza and Todd testified that they saw Duke in his office a few times thereafter and on one such occasion Duke introduced them to Helm. That Hadzima, Todd, Spicuzza and Helm discussed terms concerning Helm flying birds into the United States for them. Thereafter, according to Helm, Spicuzza and Todd a load of birds was flown into the United States by Helm and landed at Apple Valley, California where they were taken by Spicuzza and Todd. This transaction forms the basis for Counts II and III.

Helm testified that his first information concerning bird smuggling came from Duke on February 12, 1953 immediately after he was granted probation. Helm said that Duke advised him that he should start smuggling birds instead of aliens and that Duke then told him about Vosburg. Helm said at this time (February 12th) Duke told him he was going to get an acquittal on the Vosburg case. (Tr. p. 1033) Helm said he had not heard of Vosburg prior to this time and that he did not recall being in court with Vosburg on the day his (Helm's) case was continued and the Vosburg case went to trial.

Helm said that on Duke's advice he met with Spicuzza, Todd and Hadzima in Duke's office. That thereafter, on April 1, 1953, in accordance with arrangements, flew a load of psittacine birds from Mexico to Apple Valley, California and delivered them to Spicuzza or Todd.

Helm said he stayed at the Apple Valley Inn that night, and that he called Duke in San Diego by long distance telephone from the Apple Valley Inn. (Tr. p. 1050-1052) Helm produced a receipt from the Apple Valley Inn which contained a notation



showing a charge of \$1.51 for a phone call. Helm said this receipt represented the call that he had made to Duke. (Tr. p. 1416)

(Note: Records of Apple Valley Inn show this call was made to a woman in Los Angeles and not Duke. Tr. p. 2589 - 2603)

Counts IV, V and VI

Count IV charges a second conspiracy beginning in April, 1953 and continuing to December, 1954. Duke, Ballard and Buono are charged as defendants. Robert Helm, Hadzima, his wife, Mary Ascani and a Roy Pursselley were named as unindicted co-conspirators. The latest date of any overt act charged was June, 1953.

Counts V and VI charge that on May 13, 1953 Duke, Ballard and Buono smuggled, received and transported thirty crates of psittacine birds. Said counts are the substantive offenses alleged to be the object of the conspiracy charged in Count IV.

The witnesses giving evidence as to these counts were Hadzima, Helm, Ascani, Spicuzza, Todd and Raymond Curtis, key witnesses being Hadzima and Helm. (Tr. pp. 1053-1091, 800 - 841)

Although there were conflicting versions of the various occurrences in resolving the conflicts most evidence in substance was that while the conspiracy alleged in Count I was in progress, Hadzin Ballard, Helm, Duke Buono and Roy Pursselley entered into a separate conspiratorial agreement, the object of which was to steal birds from Spicuz and Todd.

According to Hadzima and Helm a number of discussions in this respect were had in Buono's office in the presence of both Duke and Buono. In the latter part of April or the first part of May, 1953 Spicuzza, Todd and Raymond Curtis arranged for Helm to fly a load of birds into the United State,

After much discussion as to where these birds were to be landed Helm suggested an abandoned air strip near Desert Center, Riverside County, California. Spicuzza and Curtis agreed. A pilot named Joe Navarro who had flown birds from Mexico City to points near the border for Spicuzza Todd and Hadzima during 1951 and 1952 was to fly the birds from Mexico City to a point in Lower California where they were to be picked up by Helm and flown to Desert Center.

According to one version given by Helm, he met with Hadzima, Ballard, Duke, Buono and Purssellet in San Diego on May 11, 1953 in Buono's office. At that time it was agreed that Helm would fly the birds into Desert Center on the evening of May 13, 1953 and that Hadzima, Ballard and Pursselley would be on hand to take the birds from Spicuzza and Curtis.

Helm, pursuant to his separate agreements, one with Spicuzza, Todd and Curtis, and the other with Hadzima, Ballard, Pursselley, Duke and Buono, piloted his plane carrying a load of birds to Desert Center on the evening of May 13, 1953. Spicuzza and Curtis were at the airport to receive the birds. Helm landed, unloaded and stalled for time until Hadzima, Ballard and Pursselley arrived. Ballard bound Curtis and Spicuzza; Helm flew his plane away; and Pursselley and Hadzima took the birds to the Burbank, California aviary of Mary Ascani,

who, according to previous arrangements, was waiting to receive them.

Thereafter, Mary Ascani sold the birds, the proceeds being delivered to Pursselley, Helm Ballard and Hadzima. Helm testified that he came to San Diego in the latter part of May with Pursselley and that Pursselley told him he was going to deliver to Buono and Duke \$1500. each as their share. Pursselley was not called as a witness, however. The balance of the proceeds was divided among Ballard, Hadzima, Helm and Pursselley. (Tr. p. 800-841, 1053, 1099)

Helm and Ascani attempted to bolster their testimony with respect to telephone conversations they claimed they had with Duke concerning the events in these counts by producing two documents Helm said he called Duke long distance on April 29, 1953 at a "confidential number" which he said Duke had previously given him. Helm produced a business card with the so-called "confidential number" penciled in the corner stating this was the number he called. Duke's phone records revealed that the number belonged to an employer association, was not "confidential" and not even in existence on April 29, 1953, but was installed on May 18th of that year. (Tr. pp. 1062-64 - Govts. Ex. 4)

Mary Ascani said she called Duke's office on May 24, 1953, but that Duke was in court and returned her call later that day. She produced a telephone bill showing a call to San Diego dated May 24th saying this was the call she made to Duke. A 1953 calendar put in evidence showed that May 24th was on Sunday. (Tr. 1776-78;1808-10)

This transaction forms the basis for Counts V and VI; and according to the overt acts alleged

is the object of the conspiracy charged in Count IV.

Counts VII, VIII, IX and X

Count VII charges another conspiracy beginning in June, 1953 and continuing until October, 1953. Duke and Buono are named as defendants, and Spicuzza, Todd, Helm and an Albert Appel were named as unindicted co-conspirators. Counts VIII, IX and X charge that Duke and Buono smuggled birds into the United States on June 25, 1953; on August 28, 1953 and on September 28, 1953. These counts are substantive offenses and are the object of the conspiracy alleged in Count VII.

The witnesses who testified with reference to these counts were Spicuzza, Todd and Helm. Resolving the conflicting versions most favorable to the prosecution, the substance of the evidence was that in June, 1953 Duke and Buono met with Spicuzza, Todd and Helm in Buono's office, and that Buono obtained a loan of \$2500. from Albert Appel which he delivered to Helm to be used as a down payment on an airplane which Helm was to purchase for the purpose of smuggling birds with Spicuzza and Todd. (Tr. 218-225)

According to Spicuzza, Buono and Duke advised them to go back into the bird smuggling business and assured them there would be no more hijacking. Helm, Spicuzza and Todd formed a partnership and agreed that profits would be divided equally among the three. Helm bought an airplane and according to the testimony transported birds from Mexico to the United States with Spicuzza and Todd on June 25th, July 17th, August 28th and September 28, 1953. Spicuzza repaid

Buono the \$2500. loan out of proceeds from the sale of these birds. (Tr. 222; 224-251)

According to Spicuzza, in the summer of 1953 Buono loaned him various sums of money which were used by Spicuzza, Todd and Helm in connection with the smuggling activities. (Tr. 225-248) After June, 1953 all birds smuggled by Helm, Spicuzza and Todd were first landed at Las Vegas and delivered to the home of a person named Robert Crapella where they were unloaded and stored. (Tr. p. 1597-1600) Helm said he had introduced Spicuzza to Crapella and that he and Spicuzza had been to Crapella's house several times with their birds. (Tr. p. 1342)

Note: Helm testified in this same court as a witness for the Government in 1954 that he had never been to Crapella's house with Spicuzza and that he had never see any birds at Crapella's house. When confronted with the transcript of his previous testimony Helm admitted he had so testified and by way of explanation said that he evidently did not tell the truth. (Tr. 2620-29; App. 441-52)

Both Todd and Spicuzza testified that neither Duke nor Buono at any time asked for or received any share of the profits derived from their alleged smuggling operations. (Tr. pp. 243; 1546-47)

During this period while Duke was supposed to be involved in a conspiracy with Helm, Buono, Spicuzza and Todd, Hadzima testified over objection by Mr. Whelan that he, Duke and Ballard were involved in a separate conspiracy. Hadzima said that from July, 1953 to December, 1954 he smuggled some 40 or 50 loads of birds into the

United States. This venture earned him approximately \$150,000. Hadzima said he and Ballard each took 45% of this sum and gave Duke 10% in exchange for advice. (Tr. pp. 842-860)

10. The Government rested its case on August 19, 1955. (Tr. p. 1875, line 3)

11. On August 20, 1955, and before producing any evidence, Duke made the following motions:

(a) Motion for judgment of acquittal.
(Tr. p. 1879)

(b) Motion to strike overt acts numbers three and six from Count I of the indictment.
(Tr. p. 1918 - 1919)

All motions were denied. (Tr. p. 1930, line 20)

12. Case of the Defense:

In view of the fact that the jury resolved the conflicting evidence against the defendants, and in favor of the prosecution, we will not detail the evidence produced on defense.

Duke and Buono testified at length; denied generally and specifically that they had been a party to any of the unlawful conduct alleged in the indictment and testified to by the witnesses.

In general, Duke testified that his relationship with the witnesses Spicuzza, Todd, Hadzima and Helm was confined to representing them as an attorney. He denied that he introduced Helm to Spicuzza, Todd or Hadzima; and denied that he ever suggested to Helm that he participate in

any smuggling enterprise. He testified that he never met with Helm and either Spicuzza, Todd or Hadzima in his own office or in Buono's office. Buono likewise testified that no such meetings took place. (Tr. pp. 2303, et. seq; 3014, et. seq.)

Insofar as Duke is concerned the rest of the evidence produced on defense was directed to matters bearing on the motive, bias and general credibility of the prosecution witnesses, and by way of impeachment of their testimony.

Some of the evidence offered by Duke was received and some rejected. As to evidence rejected, detailed offers of proof were made. These questions will be discussed in the argument.

One item of evidence admitted for the limited purpose of impeaching Hadzima which created considerable controversy was a recording of a telephone conversation between Duke, Buono and the witness Hadzima, wherein Hadzima confessed to being a participant in a somewhat fantastic plot to frame Duke. (D's. Ex. R & S) The principle controversy concerned the purposes for which the jury was authorized to consider statements on the recording. (Tr. 2048-96; App. 367-389)

Considerable confusion developed as a result of what could have been a general misunderstanding with respect to what Duke was going to prove in his defense. Right or wrong, it appears that the prosecution and court entertained the belief that Duke at the outset of the case had announced that he was going to prove that an independent conspiracy was in operation among a number of persons, the object of which was to frame and convict Duke on false charges.

Right or wrong, it appears that Duke did have the impression that insofar as the present trial was concerned the suggestion came from the prosecution or the bench; and right or wrong, it appears that Duke did believe that the court and the prosecution had called upon him in the presence of the jury to prove this independent conspiracy to frame him.

The result was that Duke undertook to offer evidence on this issue. After considerable confusion which involved Duke, his associate counsel Mr. Fitzgerald and the counsel for the other defendants, the proof offered was rejected. This matter will be discussed further in argument inasmuch as Duke claims that he was substantially prejudiced in the presence of the jury.

The rebuttal of the prosecution, insofar as Duke is concerned, consisted of evidence offered to rehabilitate the witnesses Helm and Hadzima, and by way of impeachment of the testimony of Duke and Buono.

13. On September 13, 1955 the taking of evidence was completed and all parties rested. (Tr. p. 4208) Duke made a motion, which was taken under advisement, for a judgment of acquittal on all counts. (Tr. p. 4307)

14. On September 23, 1955, the jury returned verdicts finding Duke guilty on all counts; Ballard guilty, counts 4 to 6 as charged; Buono not guilty counts 4 to 6, and guilty counts 7 to 10.

The Court denied the motion for judgment of acquittal and set the time for hearing on any

motions and for pronouncement of judgment for September 30, 1955 at 10:00 A. M. (Cl. Tr. 245-247)

Proceedings Subsequent to Trial

15. On September 28, 1955 Duke filed a motion in arrest of judgment and a motion for a new trial. The motion for a new trial was stated to be on the grounds that Duke had been deprived of the right to be represented by counsel of his choice; and further that he was deprived in certain instances of any effective representation by counsel, in violation of the Fifth and Sixth Amendments to The Constitution of the United States. (Cl. Tr. p. 289)

16. On September 30, 1955 Mr. Barton C. Sheela, Jr. and Mr. George Williams Rutherford, attorneys at law, appeared and were granted leave by the court to associate as co-counsel on behalf of Duke for the hearing on the motion and pronouncement of judgment.

17. On September 30, 1955 Duke's motion in arrest of judgment and motion for new trial were denied. (Cl. Tr. p. 284-285)

18. On September 30, 1955 all motions were denied and the court pronounced judgment and sentence as follows:

(a) Duke - was sentenced to prison for five years on each of Counts I, IV and VII to run concurrently; two years on Counts II, III and V; two years on Counts VI and VIII; two years on Counts IX and X. Each of the two year sentences were ordered to run consecutively to the five year sentence, making a total term of eleven years. (Cl. Tr. p. 296)

(b) Ballard - was sentenced to prison for a term of nine years. (Cl. Tr. p. 296)

(c) Buono - was fined in the total sum of \$5, 000. 00 and placed on probation.

This appeal followed.

SPECIFICATION OF ERRORS

FIRST

(Re: Questions 1, 2, 3)

The court denied Duke the right to proceed to trial as his own counsel and in some instances deprived Duke of any effective representation by counsel, all in violation of Articles Five and Six of the Amendments to The Constitution of the United States, and by reason thereof the judgment of conviction is void. If the matter was discretionary the court abused its discretion;

1. on August 3, 1955 prior to trial in ruling that Duke could not testify and also argue the case if he elected to represent himself;

2. in ruling that Duke could not appear in propria persona and have the assistance of an associate counsel;

3. on August 4th prior to any proceedings in the presence of the jury in refusing Duke's request to be permitted to outline his case to the jury by way of an opening statement; and

4. prior to commencement of trial in the presence of the jury in denying Duke's motion to release his associate counsel and represent himself;

and as a result of the court's rulings Duke was substantially prejudiced and deprived of a fair trial, and it was error for the court to deny Duke's motion for a new trial.

(Tr. 28-45; 96; 3357-3360; 3391; 3896-3903;
Cl. Tr. 110; 289)

SECOND
(Question 6)

It is proper to cross-examine a witness concerning his prior acts and declarations bearing on his bias, prejudice and motive in testifying; and the court erred, first, in directing Duke to not cross-examine Hadzima with respect to such matters but to offer such proof affirmatively in his own case; and second, in refusing to admit evidence of Hadzima's prior acts and declarations when offered to prove his bias, corrupt motive and interest in the case.

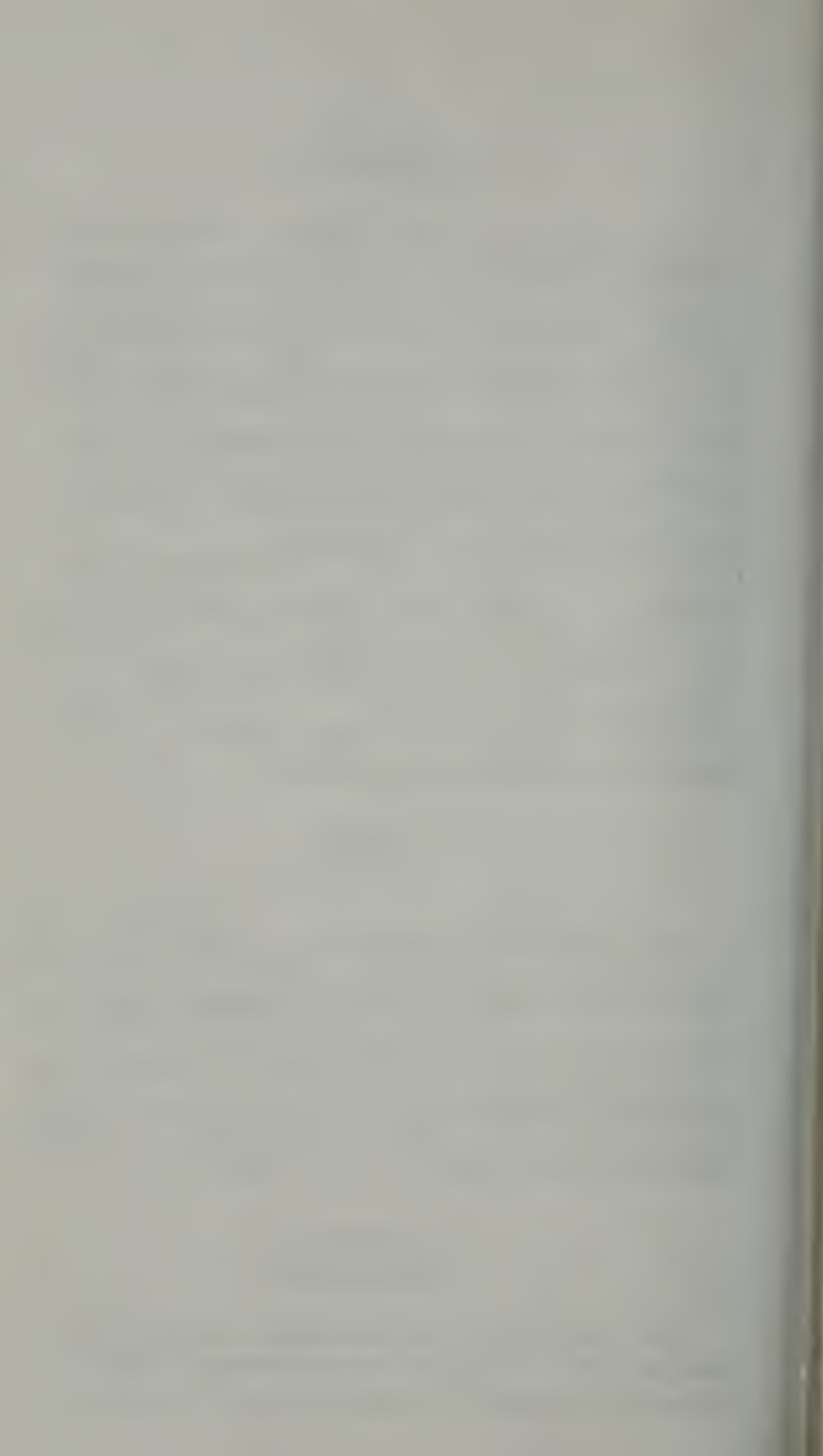
(Tr. 956-57; App. 242-43. Tr. 2657-59; App. 452-54. Tr. 3361; App. 504-5. Tr. 3366-67; App. 508. Tr. 3372-73; App. 512. Tr. 3378-88; App. 515-520. Tr. 3391-92; App. 522. Tr. 3398-3448; App. 525-548. Tr. 3517-31; App. 553-558. Tr. 3581-85; App. 565-570. Tr. 4280-91; 4296-98; App. 649-652)

THIRD
(Question 7)

The court erred in refusing to admit the testimony of Duke's former law associate to the effect that during a specific period Duke was heavily in debt and had to borrow funds from the bank to meet current expenses, to rebut the testimony of the witness Hadzima that during the same period he had delivered to Duke fabulous sums of money which Duke had denied. (Tr. 3294-3297)

FOURTH
(Question 8)

The court erred in refusing to admit evidence that just prior to the trial the witness Robert Helm was engaged in illegal conduct in violation



of United States laws and had not been prosecuted therefor.

(Tr. 2166-73; App. 395-402. Tr. 2181-2225; App. 403-430. Tr. 4108-14; App. 632-37)

FIFTH
(Question 9)

It was error constituting an undue abridgment of the right of cross-examination to permit counsel for the witness Hadzima to appear in court and stand beside him while Hadzima was being cross-examined by Duke and advise Hadzima privately before answering questions which were within the scope of the direct examination.

(Tr. 931-34; App. 237-39. Tr. 896-97; App. 231-32. Tr. 466-68; App. 179-81)

SIXTH
(Question 10)

The court erred in instructing the jury in:

(a) refusing to give requested interim instruction to the effect that if stronger evidence were available to prove a fact, failure of the Government to produce such evidence would create an inference that such evidence would be unfavorable to them;

(Tr. 5110; App. 684-85; Cl. Tr. 244)

(b) commenting that strong suggestion had been made by some counsel that some of the Government witnesses had conspired together and that the jury should consider such accusation and consider to what extent the witnesses in the penitentiary had access to one another.

(Tr. 5089-5090; App. 675-76. Tr. 5108; 5110; App. 684-85)

(c) Refusing to instruct the jury that in the circumstances of this case a conviction may not be had solely on the testimony of accomplices unless such testimony be corroborated by other evidence.

(Tr. 2374-75; App. 440-41. Tr. 5089-90; App. 675-76. Cl. Tr. 151)

SEVENTH
(Question 12)

The prosecutor committed misconduct in the presence of the jury by:

(a) calling the witness Sankary to the stand not to elicit any material evidence but solely for the purpose of informing the jury that Duke had subpoenaed Sankary and failed to call him as a witness.

(Tr. 3803-09; 3814-18; App. 607-14)

(b) asking Duke on cross-examination degrading and derogatory questions which assumed a state of facts not in evidence and which questions were asked in bad faith because no evidence was offered concerning the matter.

(Tr. 2856; App. 454-55. Tr. 4181-83; App. 641-43)

EIGHTH
(Question 11)

The prosecutor committed misconduct during his opening argument to the jury by:

(a) making inflammatory remarks upon a subject which had been excluded from evidence;

(b) making inflammatory and prejudicial factual statements concerning Duke which were not only outside the evidence but which the prosecutor knew were not true;

(c) making statements amounting to an expression of his personal opinion that Duke was guilty.

In the circumstances of this case the cumulative acts of misconduct substantially prejudiced Duke and deprived him of a fair trial.

(Tr. 4433-4435; 4442-4445; 4451-4455; App. 657-670)

NINTH

(Question 4)

The court erred in assessing consecutive felony punishments because the offense or offenses charged were only misdemeanors by reason of specific law (Cl. Tr. 28 and 68)

TENTH

(Question 5)

The court erred in pronouncing judgment and assessing consecutive punishment on counts II, III and V, and on counts VI and VIII, and on counts IX and X because none of said counts allege facts sufficient to state any offense against the laws of the United States.

(Cl. Tr. 28, 68 and 204)

ARGUMENT

Summary of Argument

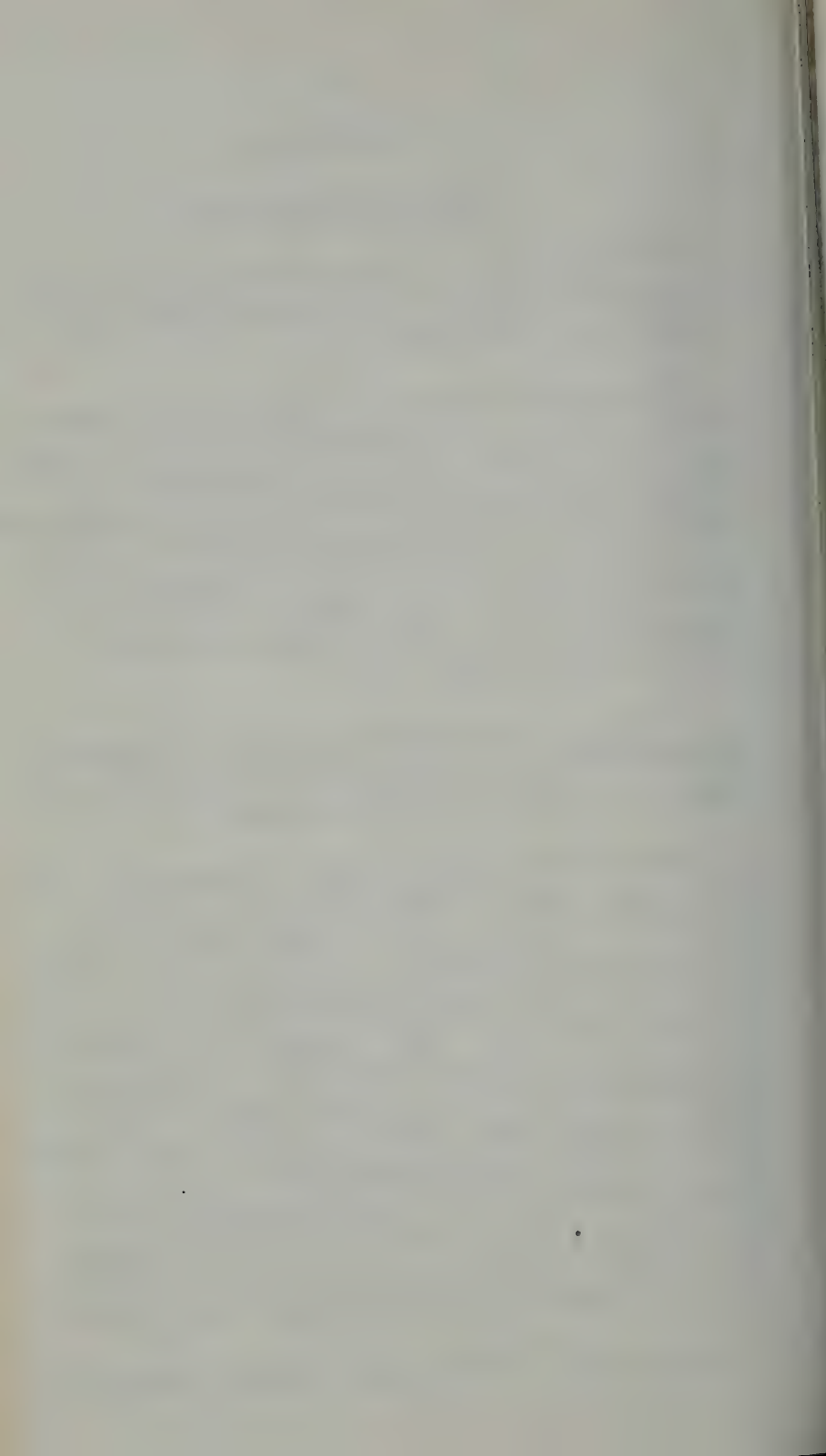
In May, 1955 two separate indictments were returned at the same time against Duke, both concerning 1953 events.

This appeal is based on the first indictment, number 25,276. In the second indictment, number 25,277, Duke was the sole defendant and charged with obstruction of justice and conspiracy with respect to conduct alleged to have occurred in connection with the 1953 bird smuggling trial. Hadzima and Helm are named as two of the unindicted co-conspirators. The second indictment is still pending.

Note: The appellee especially designated for inclusion in the record the proceedings with reference to this second indictment.

Duke was arraigned on both indictments at the same time, June 3, 1955. The record of the various proceedings prior to trial indicates that Duke apparently felt that it would be to his advantage if the case wherein he was the single defendant was tried first. Mr. Steward, the prosecutor, apparently felt that the Government would gain some advantage if the trial involving the three defendants preceded Duke's individual trial. This controversy created considerable acrimony between Steward and Duke, and during the several proceedings prior to trial Duke made an exhaustive attempt to obtain an early trial in the matter in which he was a single defendant. (Tr. 2A-55A)

On June 23, 1955 the court ordered that the two



indictments would be tried separately and stated that August 2nd was the first available trial date. Upon Duke and Steward reiterating their respective positions as to the order in which the two indictments should be tried, the court resolved the conflict by setting the trial of both cases for August 2, 1955, stating that the judge who tried the cases could decide which should be tried first. (Tr. pp. 68A-71A; 81A-92A; 126A-128A; App. 59-69)

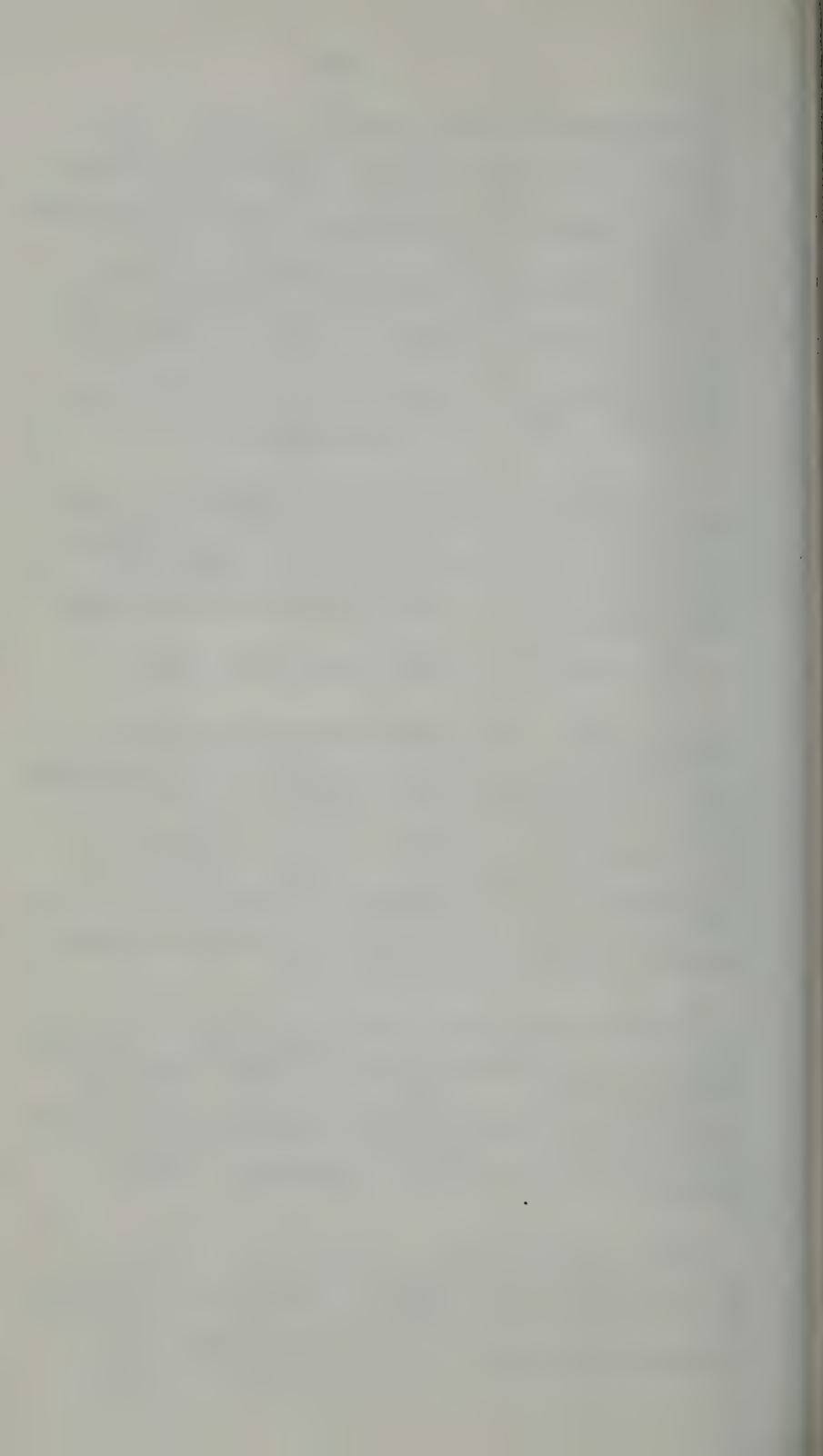
On July 25th the Honorable Ernest A. Tolin who presided at the trial settled the matter by ruling that the case of the three defendants would be tried first and that Duke's individual case would trail.

(Tr. pp. 132A-145A; App. 83c - 83 l)

Although twelve questions and ten errors are specified in this brief many of the questions and errors assigned are related and involve a single course of conduct. We are mindful of the provisions of Rule 52, Rules of Criminal Procedure (U. S. C. Rules C. 2) and readily concede that some of the assigned errors standing alone would not justify reversal.

In accordance with the rules of this Honorable Court the claimed errors have been separately stated; however, in argument errors pertaining to the same general subject matter will be presented together and their cumulative effect argued.

That no questions concerning the sufficiency of the evidence are urged is not to be construed as a concession that there is any truth in the testimony given by the prosecution witnesses.



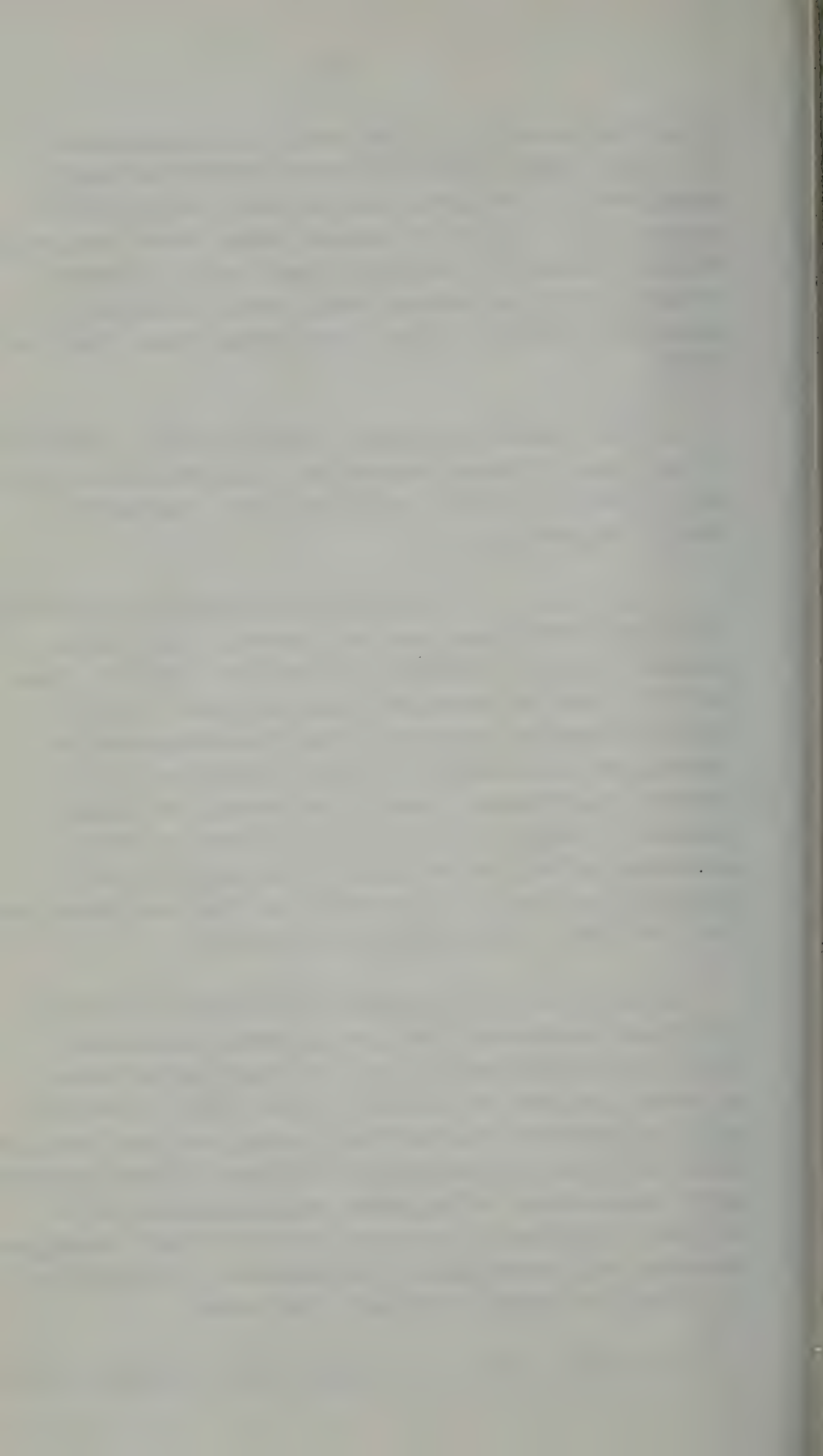
A careful scrutiny of the record demonstrates that Duke was convicted on evidence that was completely unrealistic and in many particulars proven false. This evidence came from witnesses whose credibility had been assailed by Federal prosecutors, and whose testimony had been rejected by Federal judges and juries from 1949 to 1955.

In 1955 these witnesses, under oath, confessed to various criminal activities, in some instances dating back to 1949, including theft, robbery, smuggling and perjury.

In the course of his regular profession in 1953, 1954 and 1955 Duke, as an attorney, defended most of these witnesses. Then for the first time in 1955 these witnesses enlarged upon, and in some instances recanted, their previous statements and testimony and said that Duke, their lawyer, and Buono, their bondsman, had aided, abetted, counseled and advised them in their criminal activities in 1953. Although the verdicts are somewhat inconsistent, the law presumes that the jury believed this testimony.

As an appealing defendant Duke knows the verdict was erroneous, but as a lawyer he knows that the decision of the jury on conflicting facts is never subject to review. This rule, however, presupposes that all parties to the controversy are afforded a fair opportunity to present their respective contentions to the jury, in accordance with certain fundamental procedures which are designed insofar as human agency is possible, to make certain that the verdict reflects the truth.

In the first error specified Duke complains that

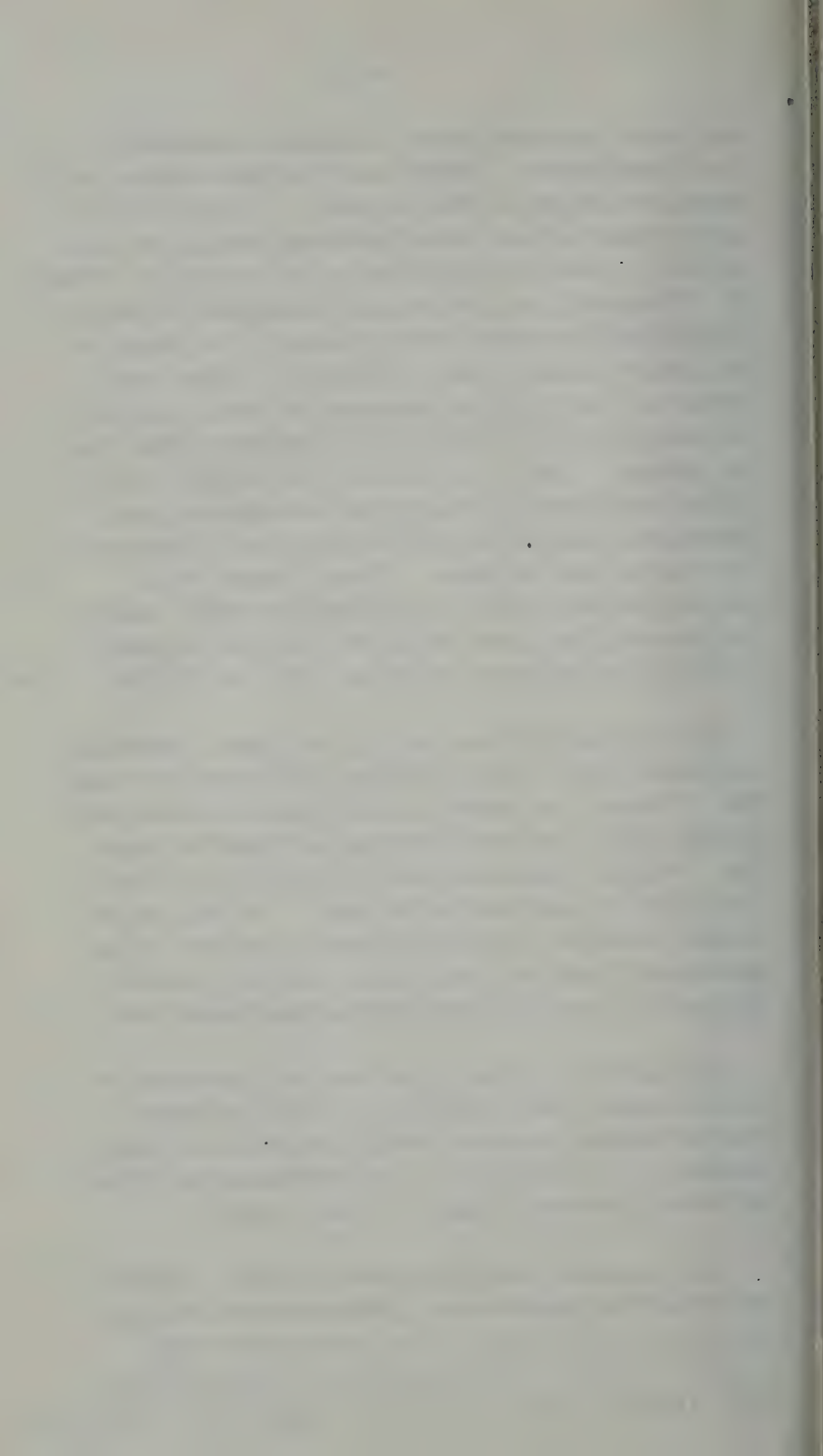


the court deprived him of counsel contrary to the Constitution. Duke was his own counsel and prepared to go to trial as such. A simple request made prior to any proceedings to be permitted to have the assistance of Attorney Clifford K. Fitzgerald as co-counsel resulted in depriving Duke of any effective counsel. As soon as the court made a final ruling that Duke could either act in propria persona or have counsel but not both Duke elected to proceed alone, and so moved. The court denied the motion, and Duke was thereby compelled to abandon the manner in which he had intended and prepared to conduct his defense. Thus, Duke, over strenuous objection, proceeded to trial unable to present his case and with a court-imposed counsel unprepared to do so. (Tr. 40-45; App. 130-34)

As a result of the court's rulings it became necessary that Duke request Ballard's Attorney, Mr. Whelan, to make a brief general statement to the jury by way of opening on Duke's behalf. Mr. Whelan likewise was not prepared to outline Duke's position to the jury. At this point, Duke contends that he had been deprived of an absolute Constitutional right, and by reason thereof the subsequent proceedings were void.

If, however, this right was not absolute but discretionary with the court, Duke contends that an abuse occurred which resulted in many instances of prejudice, the accumulative effect of which deprived Duke of a fair trial.

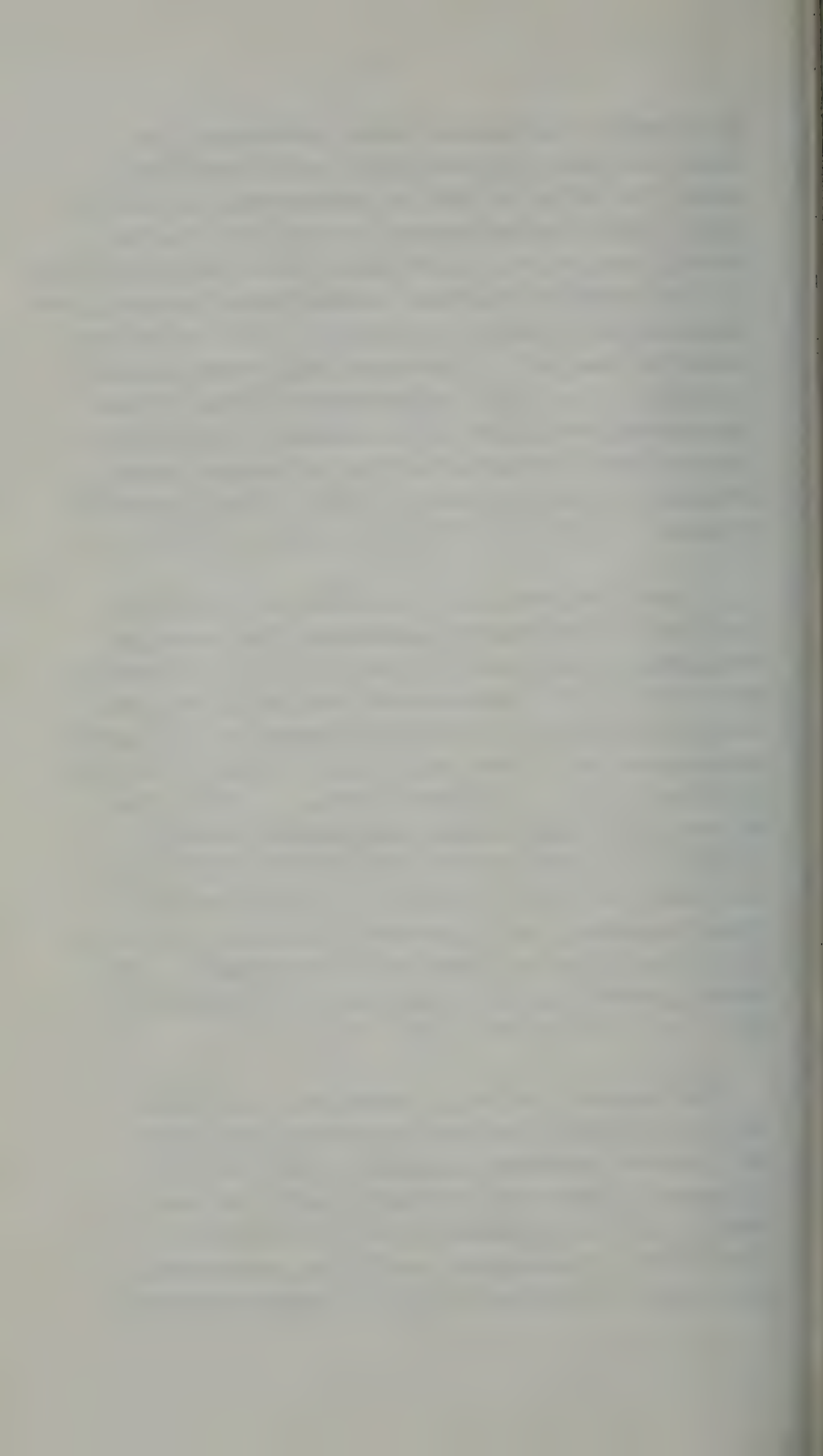
The opening remarks made by Mr. Whelan on behalf of Duke were misinterpreted during the trial by the court, the prosecutors and apparently Mr. Fitzgerald. (Tr. 1955-56; App. 344-45)(Tr. 3207-11; 3214-17; App. 464-67; 470-73)



The result was that an issue collateral to these proceedings was interjected into the case, the effect of which permeated the entire trial, including argument to the jury, all to Duke's prejudice. This issue was characterized "Duke's special defense" which label gained prejudicial prominence during the trial in the presence of the jury. Although such characterization was a complete misnomer efforts by the defense to establish facts relevant to the bias, motives and prejudice of the witnesses was branded by the prosecutors as "Duke's special defense". (Tr. pp. 3215-17; App. 470-73)

After Fitzgerald had contributed to interjecting this collateral issue into the case by responding affirmatively to a question posed by the court in the presence of the jury, he later in open court (outside the presence of the jury) renounced both Duke and his so-called "special defense". (Tr. p. 3358-59; App. p. 503) That afternoon the newspaper headlines glared - "OWN ATTORNEY SPURNS DUKE DEFENSE CLAIM". (Court's Exhibit 1) Considerable disagreement, and in some instances acrimony, developed between Duke and Fitzgerald, which development the court expressly recognized. (Tr. pp. 3896-3903; App. 621-628)

The second, third, a portion of the sixth, the seventh and the eighth errors specified all concern matters closely related to this collateral issue and probably occurred as a result of it being interjected into the case. Therefore, these errors will be presented and argued in connection with demonstrating



the prejudice that resulted to Duke stemming from the rulings of the court on August 3rd and 4th, which rulings prevented a concise clarification of the issues by Duke at the outset.

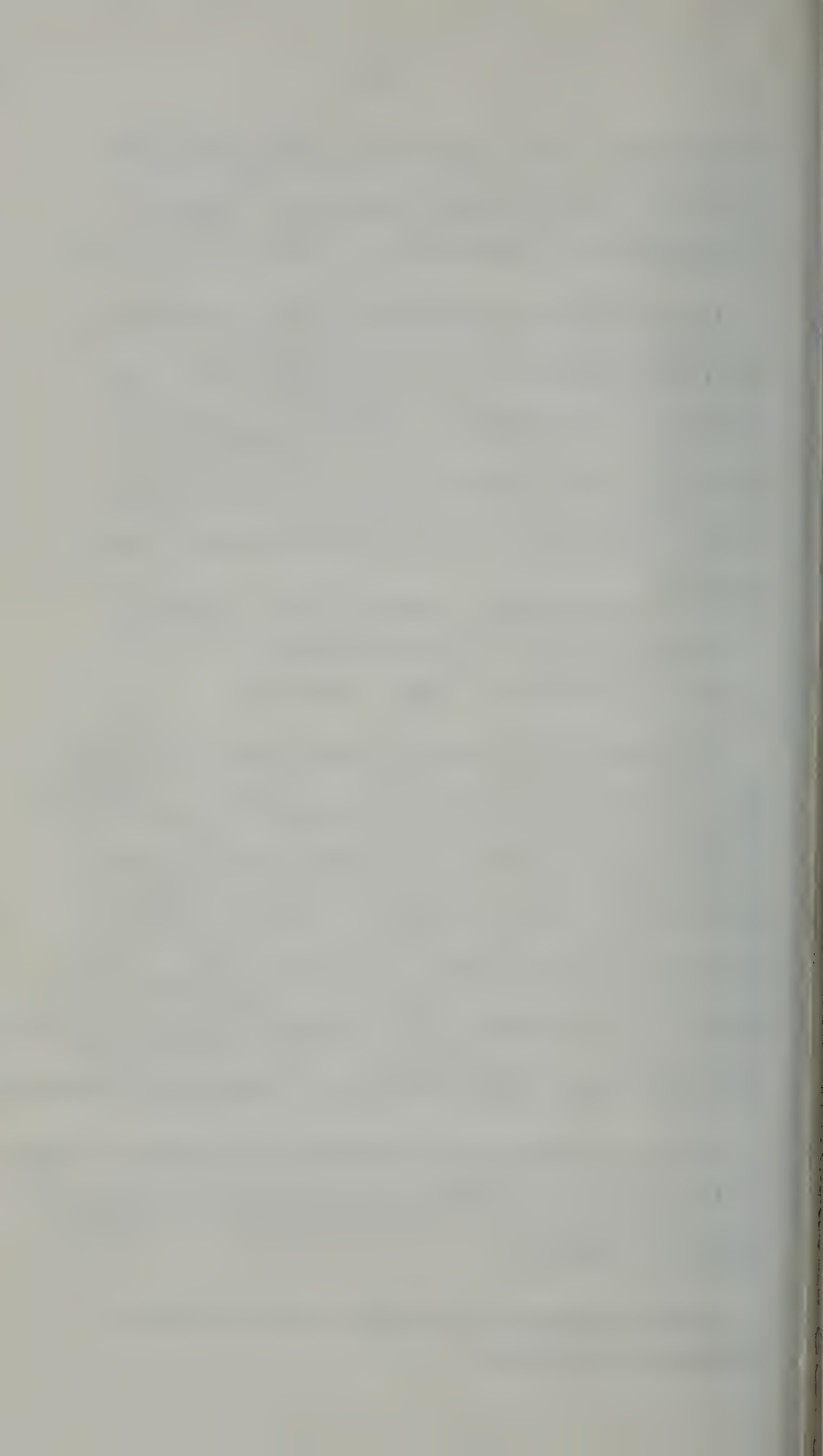
In the fifth error specified Duke complains that his right to cross-examination of a principal Government witness, John Hadzima, was unduly abridged; and the third error specified relates to refusal of the court to permit evidence to rebut testimony given by John Hadzima against Duke during this cross-examination. These two errors will be argued in conjunction.

(Tr. 931-34; App. 237-39. Tr. 896-97;
App. 231-32. Tr. 466-68; App. 179-81)
(Tr. p. 3294-97; App. 488-490)

In parts of the seventh error Duke complains of the court's refusal to give certain requested instructions. Duke requested that the court instruct the jury that a conviction could not be had on the testimony of the accomplices unless corroborated by other evidence. Mindful that the giving of such an instruction is contrary to the rule as heretofore announced in this circuit, the issue is nonetheless briefly raised for reconsideration in view of the character of the witnesses in this case upon whose testimony Duke was convicted.

The remaining errors specified involved rulings of the court concerning the legal sufficiency of the various counts in the indictment and the sentence imposed thereon.

The authorities in support of the various propositions follow.



I

THE COURT DENIED DUKE THE RIGHT TO PROCEED TO TRIAL AS HIS OWN COUNSEL AND IN SOME INSTANCES DEPRIVED DUKE OF ANY EFFECTIVE REPRESENTATION BY COUNSEL, ALL IN VIOLATION OF ARTICLES FIVE AND SIX OF THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AND BY REASON THEREOF THE JUDGMENT OF CONVICTION IS VOID.

- A. By reason of Article V and Article VI of the Amendments to the United States Constitution and the decisions of the courts thereunder an accused in a Federal criminal case has an absolute right to effective assistance of counsel which includes the right to act as one's own counsel.

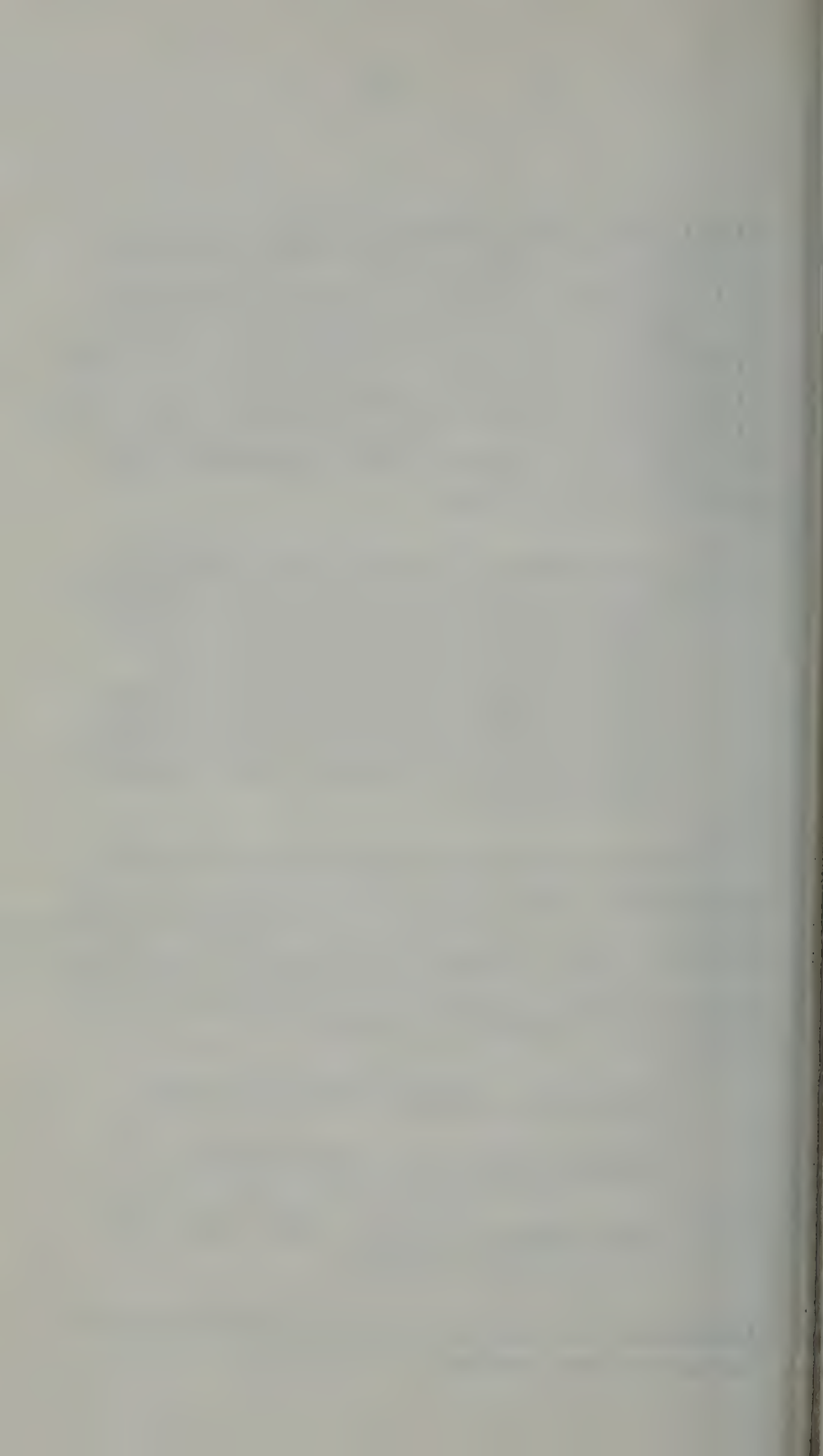
The decisions of the Supreme Court of the United States and the Courts of Appeals for the various circuits uniformly hold that non-compliance with the constitutional requirement of assistance of counsel of one charged with crime deprives the court of jurisdiction to proceed.

Johnson v. Zerbst, 304 U.S. 458

Glasser vs. U. S., 315 U.S. 60

Kuczynski v. U. S., 149 F. 2d. 478
(C. A. 7, 1945)

Likewise, the accused has the absolute right to act as his own counsel.



Adams v. U. S., 317 U.S. 269

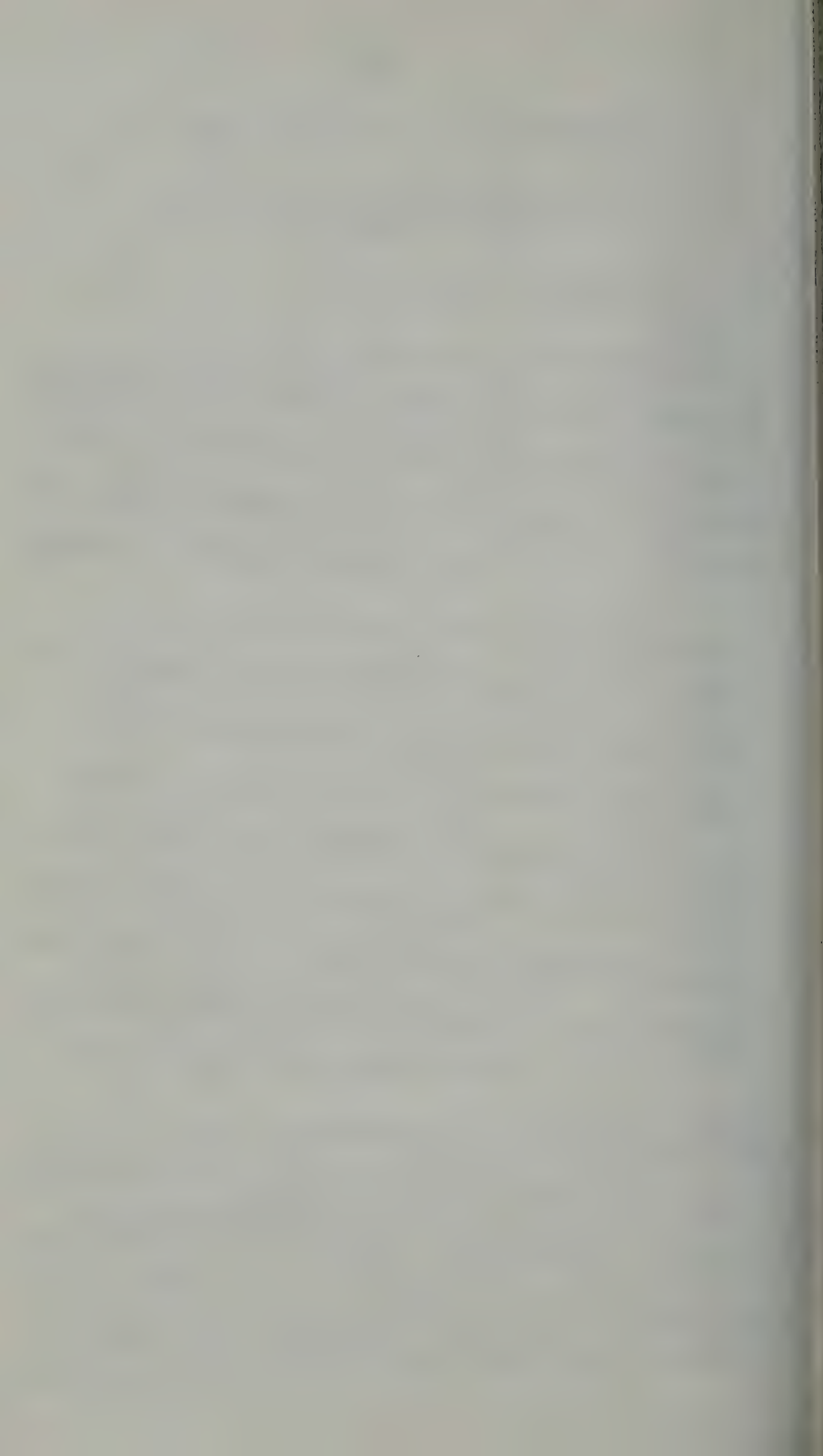
U. S. v. Bergamo, 154 F. 2d 31
(C.A. 3, 1946)

28 U.S.C. 1654

The provisions of the Constitution and Statutes and the substantive rules established by the court decisions concerning the right to counsel all embody the fundamental concept that an accused must be afforded a fair opportunity to defend against the charge. As stated by the Supreme Court in Adams v. U. S., 317 U.S. 269, at page 279:

"The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. . . . An accused must have the means of presenting his best defense. . . . But evidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively before the Court. But the Constitution does not force a lawyer upon a defendant. He may waive his constitutional right of assistance of counsel if he knows what he is doing and his choice is made with eyes open. "

Characterization of constitutional rights as being either "absolute" or "discretionary" is not precisely correct. The "right" itself is absolute and exists by reason of its express inclusion in the Constitution. The manner in which the "right" is exercised is subject to regulation and control in the sound discretion of the court, provided full exercise of the right is accorded. Thus, the "right" is absolute, the exercise



of which can neither be denied or impaired, but the regulation of the manner of its exercise is discretionary.

Thus, the court obviously has discretion in regulating the conduct of counsel during the trial. Likewise, an accused who is afforded competent counsel of his choice cannot during the trial under the guise of pretending to exercise a constitutional right, relieve his counsel for purpose of gaining a delay or for any other improper purpose. In such case the accused is not attempting to exercise a right given by the Constitution, and the court certainly has authority and discretion to control such abortive conduct.

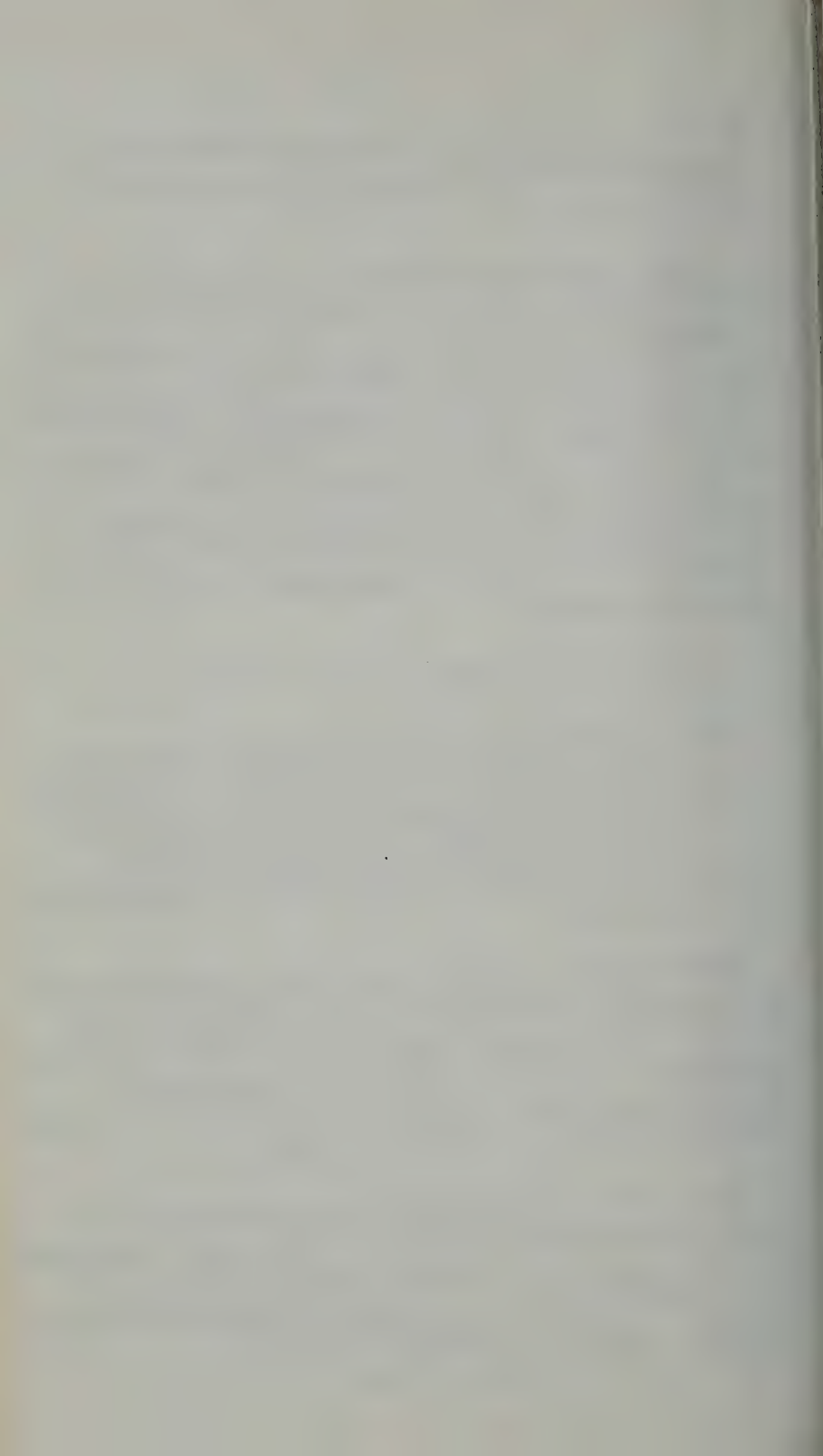
U. S. v. Foster, 9 F. R. D. 367

- B. By Reason of the rulings of the trial court prior to the commencement of any proceedings in the presence of the jury Duke was denied the right to proceed as his own counsel and by reason thereof this judgment is void.

Duke was an attorney and at the time of trial and prior thereto was admitted to practice before the Federal court in which his trial was had. Duke had appeared as his own counsel at all stages of the proceedings prior to trial. (Tr. pp. 3A; 36-A; 56-A; 129-A; App. pp. 3, 19, 31, 44, 83a)

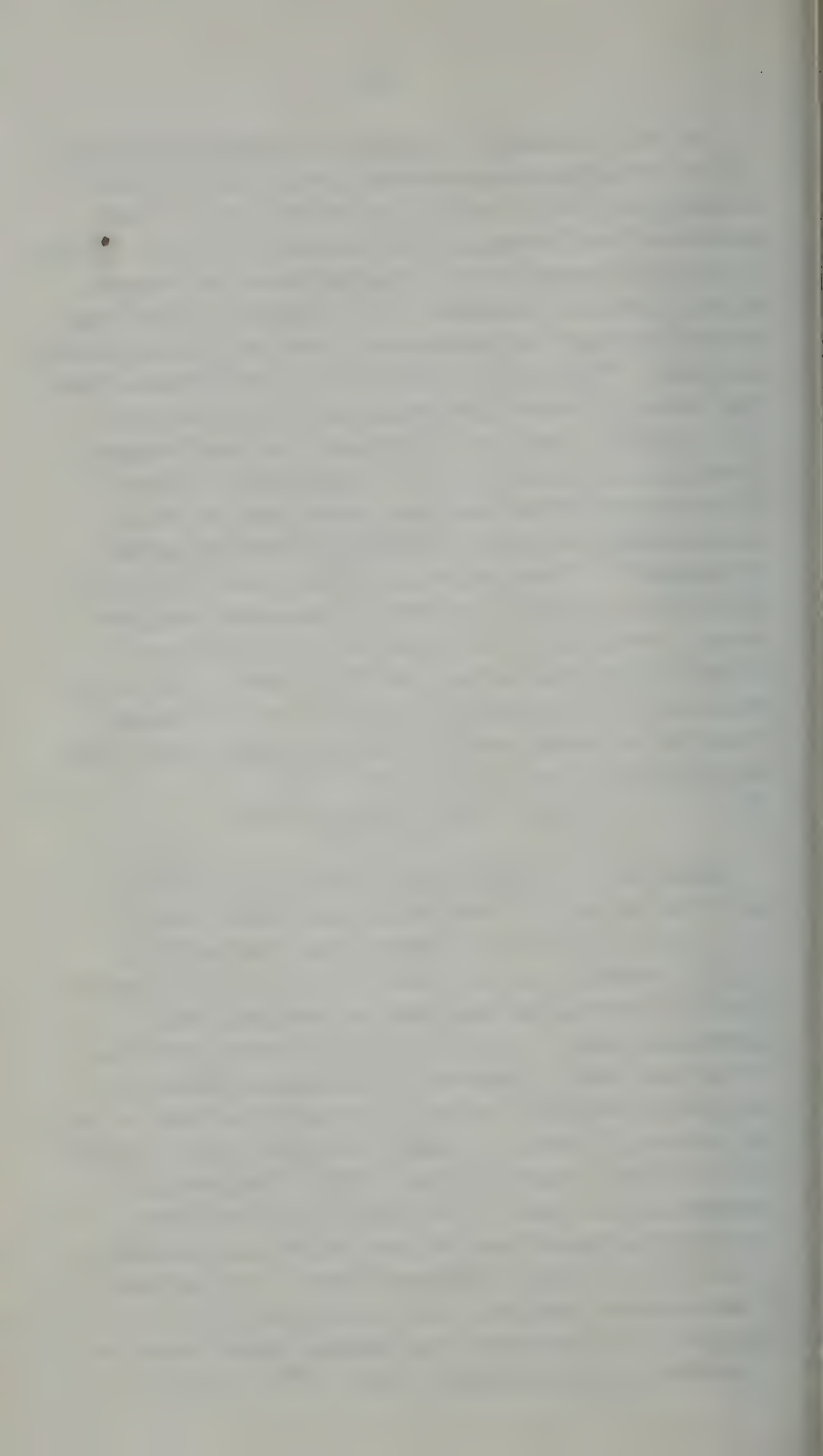
On July 25, 1955 a hearing was had before The Honorable Earnest A. Tolin, Trial Judge, concerning pre-trial matters. At that time Duke announced that he was appearing in propria persona and no question was raised with respect thereto.

(Tr. p. 132-A; App. p. 83c)



On the morning of August 3rd the trial judge held a chambers conference prior to the commencement of the selection of the jury. Duke appeared and brought with him an attorney named Clifford Fitzgerald who had offered to counsel with Duke and to assist him in areas of the trial where it would be awkward to be both counsel and accused. Toward the end of the conference Duke was taken by surprise when the court advised him that he must not address the court except through his counsel, Mr. Fitzgerald. Duke immediately informed the court that he was representing himself and only associating Mr. Fitzgerald. The court said "you can't do that". When Duke stated that Mr. Fitzgerald was not even of record in the case the court advised Duke that he had better get "a lawyer of record", because if he intended to testify as a witness there were rules which would prevent him from arguing the case to the jury.
(Tr. p. 28, lines 6-24; App. p. 106)

Duke was in a dilemma. Selection of the jury was about to commence and Duke had to elect either to defend himself and forfeit his right to testify, or proceed to trial with a lawyer totally unprepared and unable to effectively represent him. During the remaining minutes of the pre-trial chambers conference Duke attempted to explain his predicament and explored the extent, if any, to which the trial judge would permit him to participate if Mr. Fitzgerald remained in the case. The court agreed Duke could argue questions of law out of the presence of the jury. Duke inquired about examination of witnesses, and the court expressed disapproval but indicated the matter would have to be settled on principles of law. The court



reserved ruling until the following day. (Tr. pp. 36-A-2, 36-A-3) Duke contends that the initial error occurred in the proceedings just related.

The court conceded that under the law Duke did have the right to elect to represent himself but imposed an unconstitutional condition on the exercise of the right.

In Thomas vs. District of Columbia, 67 App DC 179, 90 F.2d. 424, the court held that the provisions of the Constitution guaranteeing the accused in a criminal case the assistance of counsel for his defense, means effective assistance, and where the right of counsel to argue the case is denied, effective assistance is thereby forbidden.

In view of the statement in chambers that no proceedings would be had that day except selection of the jury, the court having indicated that further authorities would be examined in order to ascertain to what extent the law permitted Duke to participate and also have assistance of counsel, Mr. Fitzgerald was associated as co-counsel of record with Duke. (Tr. p. 36-A-2, 36-A-3) The jury was selected, sworn and excused until August 4, 1955. (Tr. p. 36)

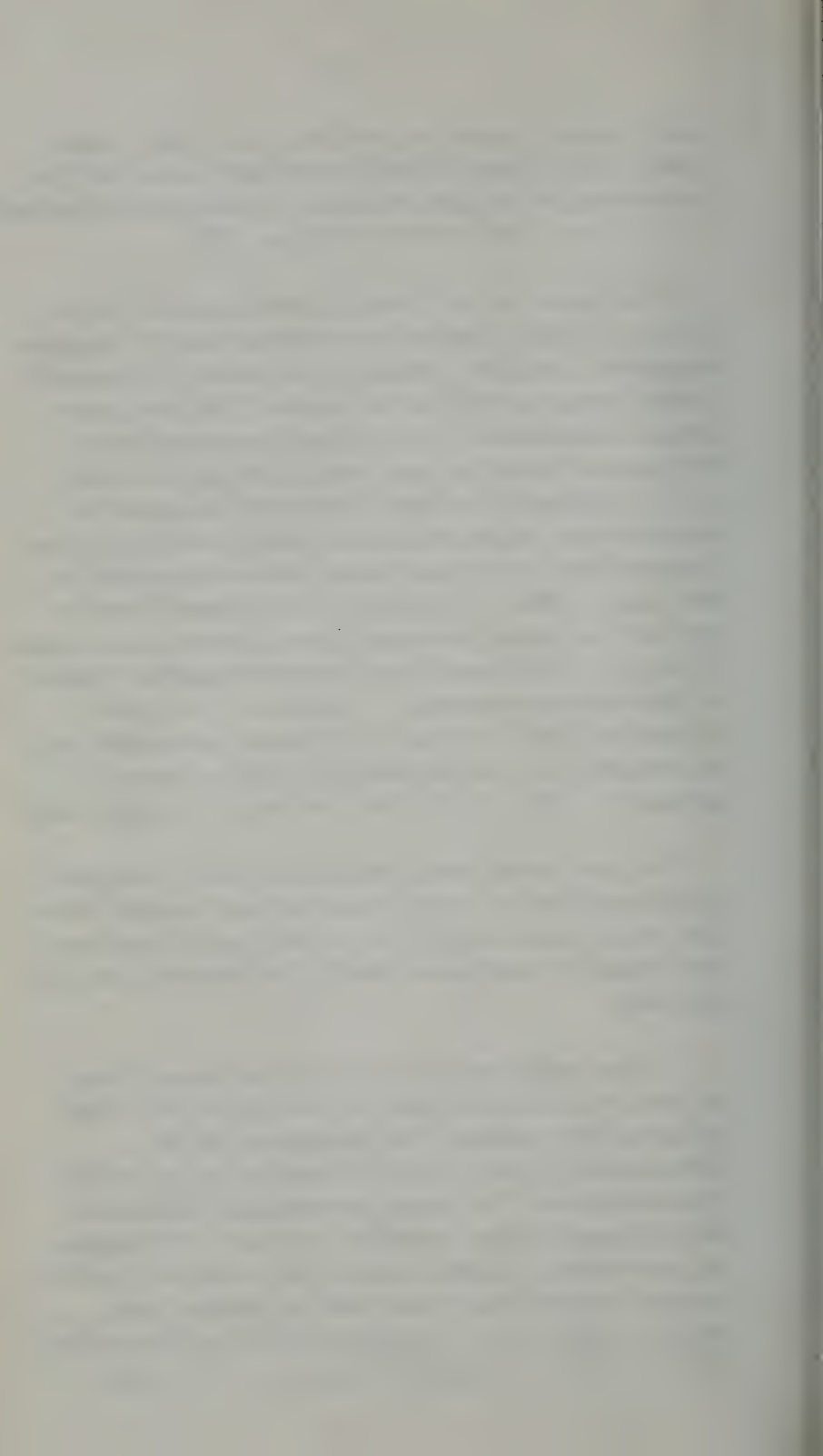
On the afternoon of August 3rd following adjournment another conference was held in the judge's chambers concerning the matter of defense counsel being permitted to interview two Government witnesses in Federal custody. The prosecutor had agreed to the interview and prepared an order which excluded Duke. When Duke objected to the order as prepared and reiterated his position that he intended to represent himself

Mr. Steward took the position that they would assert their legal right to refuse to permit the witnesses to be interviewed if Duke participated. (Tr. pp. 36-A-160-63; App. 119)

The question of Duke's participation in the trial was then argued extensively and it became apparent that Mr. Steward vigorously opposed Duke being permitted to conduct his own case. Duke emphasized that he was prepared and Fitzgerald was not and that although he had fully intended to defend himself, because of statements made in the morning conference he decided that he would leave final argument to the jury to Mr. Fitzgerald, but stated that he felt at the outset he must participate in the case. The court indicated that he would permit Duke to examine witnesses. However, the court sustained Mr. Steward's refusal to permit the witnesses to be interviewed if Duke were present. (Tr. 36-A-164, 36-A-171, App. 128)

To this point Duke had made every concession possible to avoid creating any breach with the trial judge and at the same time preserve to himself a fair opportunity to properly defend himself.

It was apparent that in view of the attitude of the prosecutors and the feeling of the trial judge in the matter, the presence of Mr. Fitzgerald in any capacity was going to make the defense of the case exceedingly difficult. Even though Duke forfeited certain privileges by proceeding alone, there were certain fundamental rights that could not be denied him, which rights, i. e., opportunity to outline case to jury, cross-examination, etc., he could



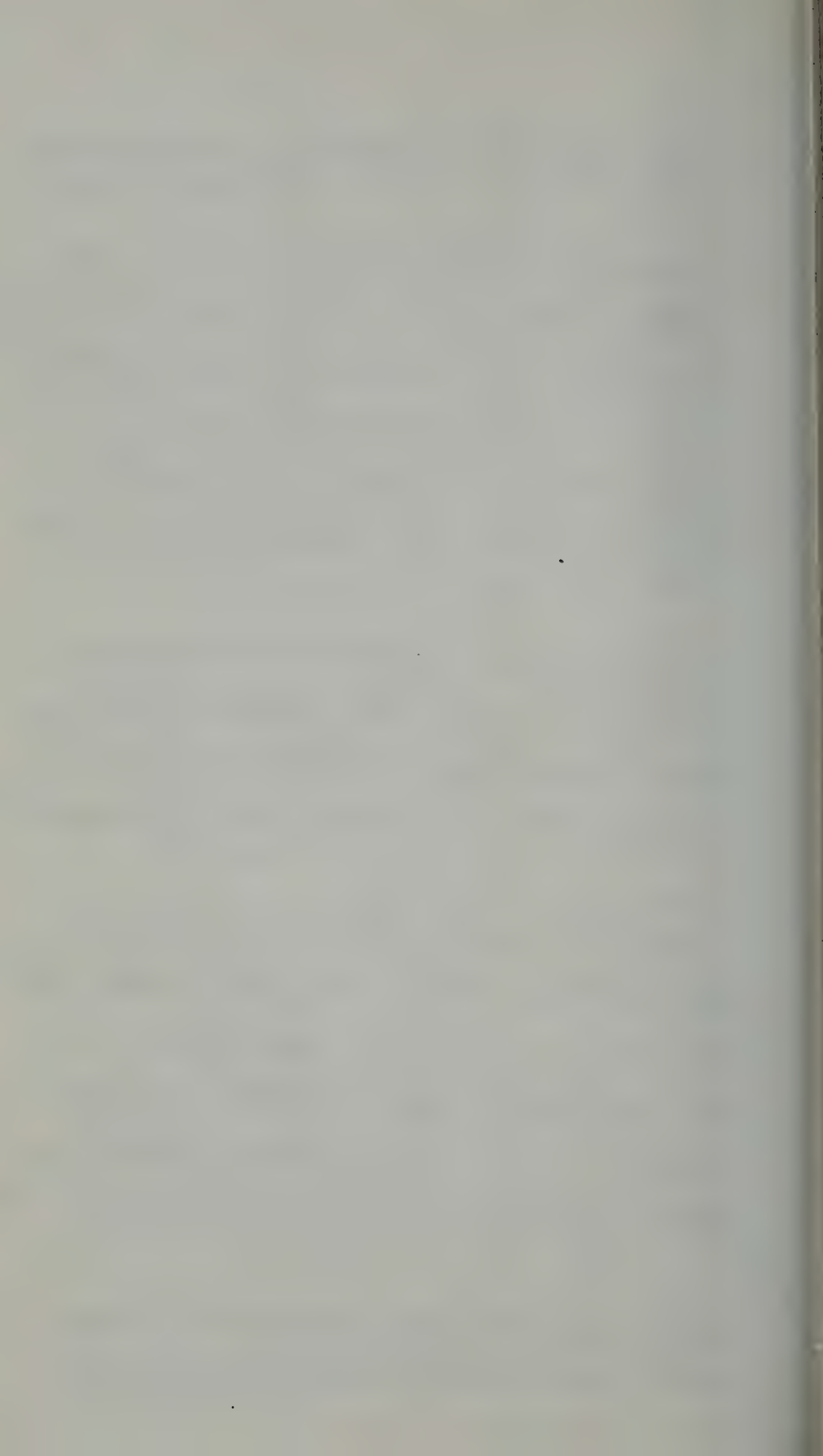
well lose by Mr. Fitzgerald's presence in the case unprepared to effectively exercise them.

On the morning of August 4th prior to any proceedings in the presence of the jury the trial judge announced that he had reviewed cases since the previous day bearing on the right of Duke to participate in his own defense. The judge said that constitutional and statutory rights were for an alternate procedure and that Duke had to either appear in pro per or be represented by counsel; that any variation from that was in the discretion of the court and not a matter of right. (Tr. pp. 40-41; App. 130)

The court said Fitzgerald must make all arguments of fact and the opening statement to the jury, and that Duke's participation would be limited to that of a defendant except that he would be permitted to examine witnesses, which privilege would be revoked if any improprieties occurred. (Tr. pp. 40-41; App. 130)

Duke specifically excepted to the court's ruling and requested leave to be permitted to make an opening statement, stating that he alone was prepared. The court denied the motion. (Tr. pp. 42-43; App. 131-32) Duke inquired if the court would permit him to proceed in pro per if Mr. Fitzgerald withdrew and the trial judge indicated that he would not permit Fitzgerald to withdraw because during the day before Duke had moved that Fitzgerald be made his attorney. (Tr. pp. 43-44; App. 132-33)

Duke explained that he only moved that Mr. Fitzgerald be associated as co-counsel, and again reiterated the limited purpose for which



Mr. Fitzgerald had voluntarily been associated and that he had previously made it plain that he intended to represent himself. The trial judge said that Duke had an attorney then and he would not release him. An exception by Duke was noted by the court. (Tr. pp. 44-45; App. 133-34) Duke then made a formal motion that the court release Mr. Fitzgerald which was promptly denied.

(Tr. p. 45, lines 17-20; App. 134)

To this point, apart from the selection of the jury, there had been no proceedings in their presence. These proceedings were but the culmination of a single concentrated attempt on the part of Duke to exercise his right under the Constitution to appear as his own counsel and defend against the charge. The attempt began on August 3rd before Fitzgerald was of record in any capacity, when the court first advised Duke to get a lawyer of record if he intended to testify as a witness.

The subsequent proceedings were merely a series of efforts on the part of Duke to effect a reasonable compromise without incurring the displeasure of the trial judge, at the same time preserving his opportunity to effectively defend himself.

Duke continually reiterated his desire to represent himself and the technical formality of associating Fitzgerald as his co-counsel was done in justifiable belief that the matter had been left open pending investigation into the applicable law. In any event, to hold that the right to counsel is so trivially forfeited is to make the constitutional safeguards embodied in the Fifth and Sixth Amendments mere "legal formalisms"

The court indicated on August 3rd, at the outset, and confirmed on August 4th, that under the law Duke had the absolute right to elect to defend in person or by counsel but not both. Duke elected to exercise that right at the first timely opportunity on August 4th when the court for the first time ruled finally on the original issue, i. e., the precise areas in which the court would permit Duke to act in a dual capacity if he had co-counsel.

If Duke at any time had the right to make the choice, as the court indicated the law gave him, then nothing occurred between 10:00 A. M. August 3rd and 10:00 A. M. August 4th which in any way reduced this absolute "right" to a mere privilege subject to revocation in the court's discretion.

The Honorable Trial Judge just didn't want Duke to defend himself. He stated at the outset on August 3rd that if there was any way that he could legally prevent Duke from examining witnesses he would do so. (Tr. p. 35) No doubt the Honorable Trial Judge felt that his rulings were justified to a certain extent because he believed it not wise from Duke's own standpoint for him to represent himself.

No doubt the Honorable Trial Judge was acting from the purest of motives, and perhaps he was just one hundred per cent right. Still, right or wrong, the choice belonged to Duke. The Constitution does not require or authorize as a condition to choosing counsel a subjective evaluation of the wisdom of the choice.

At this stage of the proceedings Duke had no counsel for his assistance. This is not the case of a defendant after conviction in retrospect seeking a technical error to urge on appeal such as in King vs. Smith, 158 F. 2d, 715, (C.A. 9, 1946) Nor is this a case where a defendant had an improper motive as the court specifically found in U. S. vs. Foster, 9 F.R.D. 367.

Duke had one single motive in seeking to defend himself and that was so that he would have a fair opportunity to adequately present his defense to the charge. The court was advised respectfully of these legitimate grounds and it was emphasized that Mr. Fitzgerald was not prepared to adequately conduct the defense and that Duke alone was prepared. Certainly there was no bad faith on Duke's part, and he rightly wanted the matter settled and Mr. Fitzgerald out of the case before the trial commenced in the presence of the jury.

It is submitted that no possible prejudice could have resulted to the prosecution nor was it even suggested. There was just no good reason to force this man to go to trial hampered in this fashion.

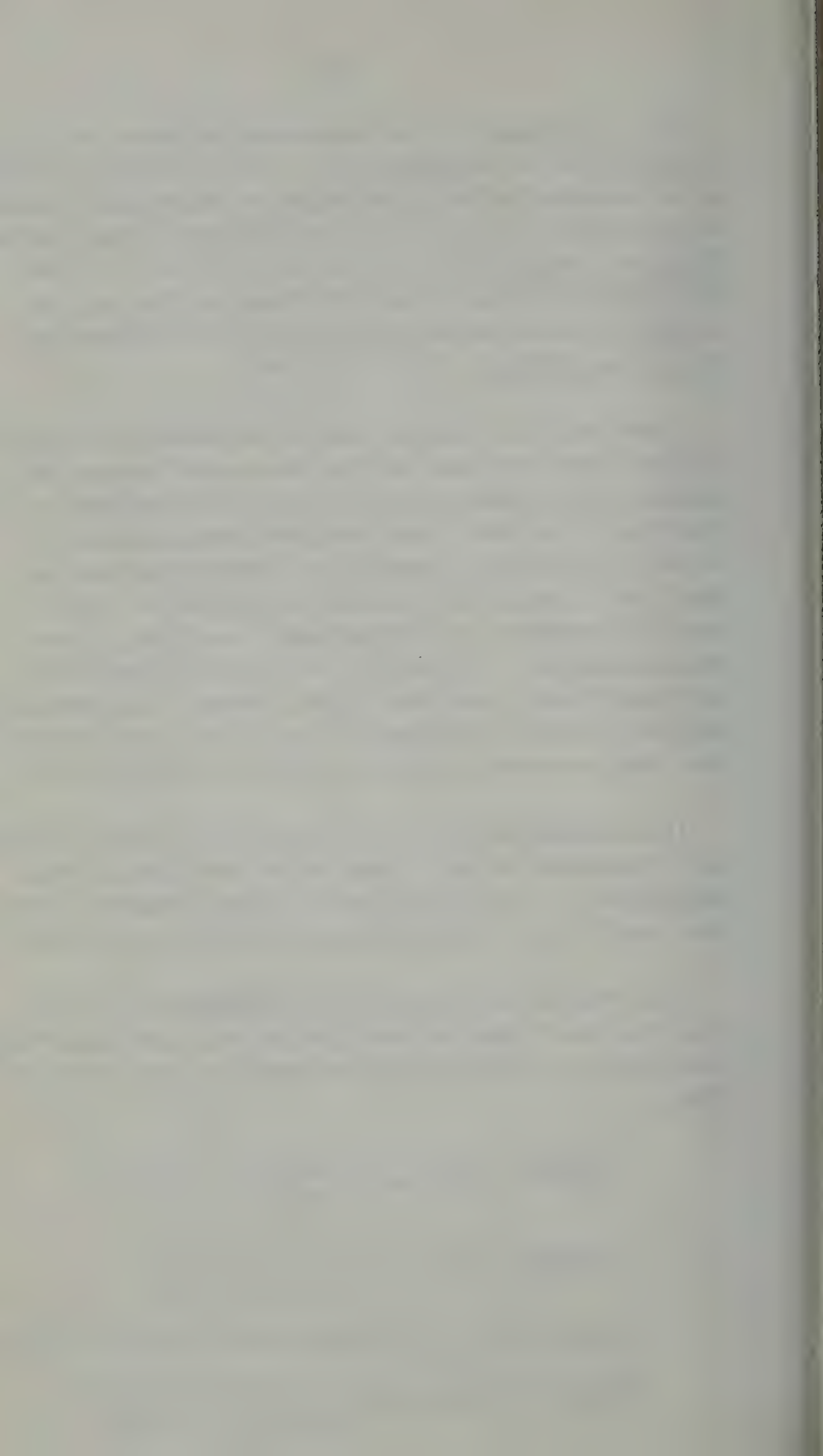
It is therefore respectfully submitted that in this the court just had no discretion, and the trial commenced without constitutional authority as to Duke.

Glasser vs. U. S., 62 S. Ct. 457,
315 U.S. 60

Kretske vs. U. S., 61 S.Ct. 835
313 U.S. 551

Roth vs. U. S., 62 S.Ct. 637, 315 U.S. 827

Kuczynski vs. U. S., 149 F. 2d 478,
(7th C.A. 1945)



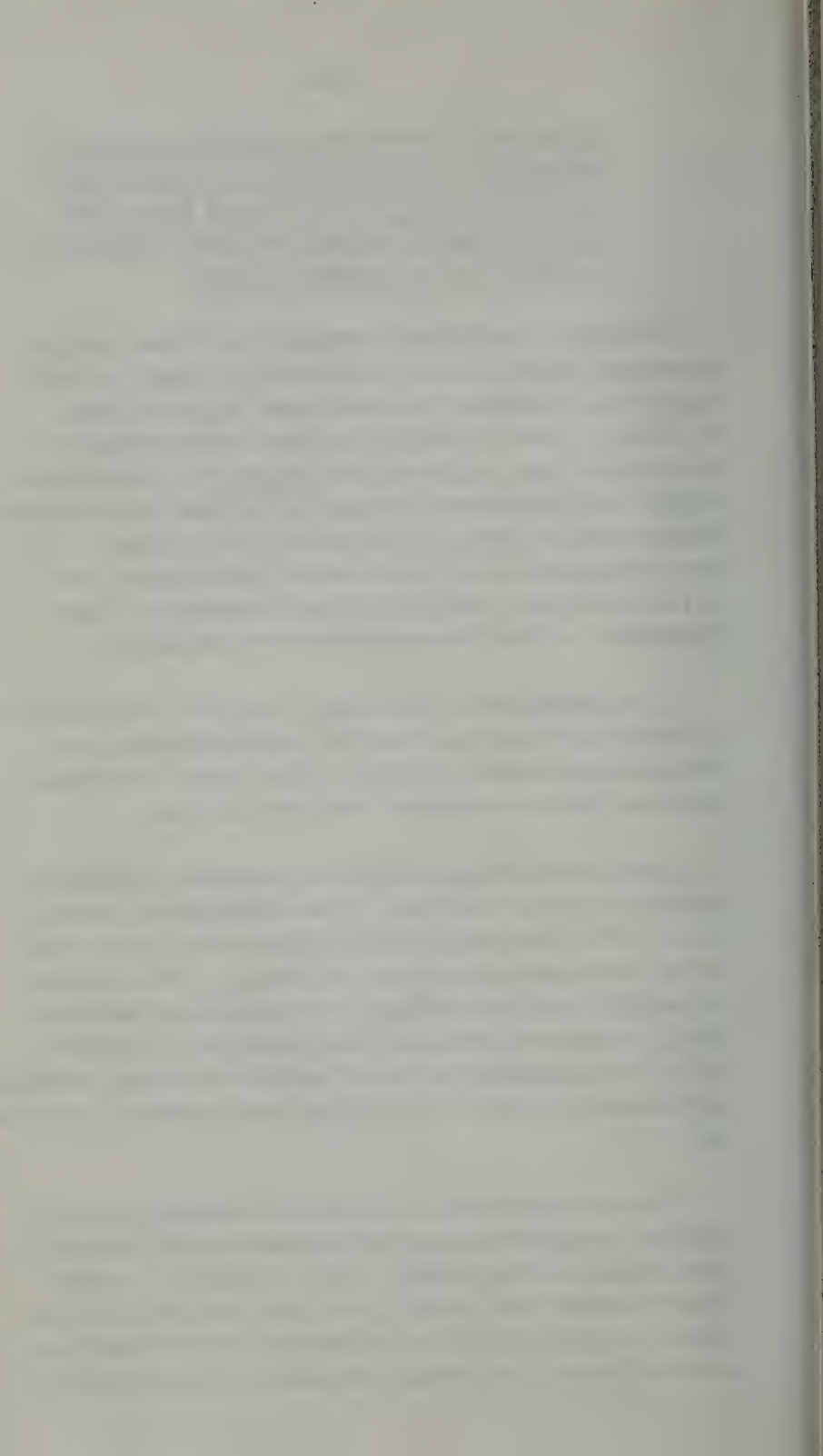
- C. If the trial court had any discretion in refusing to permit Duke to defend himself an abuse occurred and Duke was substantially prejudiced and deprived of a fair trial by reason thereof.

We have previously argued that Duke had an absolute right to elect to defend himself which right he attempted to exercise in good faith. Further, that although the court had authority to control and regulate the manner in which the right was exercised it was not within the court's discretion to prevent the exercise thereof. In the circumstances here we do not believe the trial court had discretion and therefore, the judgment is void irrespective of prejudice.

It is submitted, however, that the record discloses that Duke was in fact substantially prejudiced as a direct result of the court's refusal to allow him to conduct his own defense.

Duke was charged with ten felonies extending over a two year period. The allegations were cast in the language of the statute and conveyed little information by way of detail. The factual situation was exceedingly complicated, particularly in view of the fact that Duke was charged with participating in three separate conspiratorial agreements which overlapped one another, supra, pp. 3 - 5.

If there ever was a case that needed careful factual preparation and a concise clarification of the issues at the outset, this was such a case. Duke wanted particularly to have his defense outlined to the jury at the outset so there would be no confusion. Although the court did authorize



such opening statements, Duke was effectively deprived of any counsel to make one. It is an absolute non sequitur to say that because Fitzgerald was physically present in the courtroom Duke thereby had counsel. There was only one person in that courtroom who was sufficiently prepared on the facts so far as Duke was concerned to give him any effective assistance, and that was Duke himself. The court ruled that here he could not assist himself. Although Mr. Whelan made a few remarks on Duke's behalf while making Ballard's opening statement, he was not counsel for Duke, nor was he prepared to be. Furthermore, the fact that Mr. Whelan represented another defendant and had objected to his client being tried with Duke and Buono necessarily restricted his comments concerning Duke to generalities of a biographical nature.

(Tr. pp. 96-97; 104-112; App. 157-78)

Thus, at the outset Duke was prejudiced by being deprived of a fair opportunity to outline his defense to the jury. The rather general remarks made by Mr. Whelan on Duke's behalf were misinterpreted by the court and the prosecutor, and apparently Mr. Fitzgerald. As a result, the trial went off on a collateral tangent placing Duke in an inextricable prejudicial position.

Although Mr. Whelan said no such thing (Tr. pp. 96-119), it was thought that he had announced that Duke was undertaking to assume the role of a prosecutor and prove by way of a special affirmative defense the existence of an independent conspiracy afoot to frame him. (Tr. 3327-30; App. 492-5)

The first suggestion of this sort came from the bench and the prosecutor's side of the table. (Tr. p. 957) However, Mr. Fitzgerald, not being

The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The author then proceeds to a detailed examination of the various theories which have been proposed to explain the origin of life. He discusses the theory of spontaneous generation, the theory of biogenesis, and the theory of abiogenesis. He also discusses the theory of the origin of life from non-living matter, and the theory of the origin of life from living matter. The author concludes that the theory of abiogenesis is the most plausible of the theories which have been proposed. He also discusses the possibility of the origin of life on other planets, and the possibility of the origin of life from extraterrestrial matter. The paper is a valuable contribution to the history of science, and it is a must-read for anyone who is interested in the origin of life.

familiar with the case, concurred in a statement made by the court that it was the court's understanding that Duke was asserting that the prosecution was part of a frame up.

(Tr. pp. 1955-56; App. 344-45)

(Tr. pp. 1960-61; App. 349-50)

Thereafter, efforts to properly discredit the prosecution witnesses by proof of their bias motives in testifying and interest in the case were labeled by the prosecutors as attempts to prove this so-called "special defense"

The matter was placed before the jury through the court's comments (Tr. 957) and prosecutors' statements in the first instance, (Tr. pp. 1955-60; App. 344-50) and then the court called upon Duke, in the presence of the jury, to prove the charge and name those accused.

(Tr. pp. 3207-18; App. 464-474)

Duke then assumed a burden of proof and offered some evidence on the theory that the same rules which the prosecution was authorized to prove a conspiracy applied to him in this instance. The evidence was rejected, but the issue not dropped by the prosecutor. (Tr. pp. 4433-39; App. 657-63) Most of the evidence offered was properly admissible in the absence of any so-called special issue on the theory that it established the bias, prejudice and corrupt motives of the prosecution witnesses.

After Fitzgerald had helped get this so-called "special defense" into the case, he boldly announced that he would have no part of it and didn't believe it. An open breach occurred between Duke and Fitzgerald at this point.

(Tr. pp. 3355-88; App. 500-20)

The first part of the paper discusses the importance of the study and the objectives of the research. It also outlines the methodology used in the study and the results obtained. The second part of the paper discusses the implications of the study and the conclusions drawn from the research. It also outlines the limitations of the study and the areas for further research. The third part of the paper discusses the significance of the study and the contributions it makes to the field. It also outlines the practical applications of the study and the policy implications of the research. The fourth part of the paper discusses the future of the study and the areas for further research. It also outlines the challenges faced by the study and the opportunities for future research. The fifth part of the paper discusses the conclusion of the study and the final thoughts of the researcher. It also outlines the key findings of the study and the overall message of the research.

That afternoon the headlines glared:

"OWN LAWYER SPURNS
DUKE DEFENSE CLAIM"
(Court's Ex. #1)

The breach widened to the point that Fitzgerald called a chambers conference, condemned Duke and asked to be relieved. Duke promptly consented, but after other counsel expressed concern at the effect such an open cleavage would have on their clients in the presence of the jury, which the trial court recognized, Fitzgerald stayed on.

At this chambers conference, which occurred on September 8, 1955, after the trial had been in progress for more than a month, the trial court expressed a willingness for Mr. Fitzgerald to withdraw, and for Duke to then proceed in propria persona.

"THE COURT: Do you wish Mr. Fitzgerald to withdraw, Mr. Duke?

"MR. DUKE: Yes. There has been a situation develop. It is because of the newspaper publicity we can't get away from.

"Maybe your Honor has seen it or maybe you Honor hasn't, where the headlines say, "Own Lawyer Spurns Duke Defense Claim".

(Tr. p. 3897, lines 13-19)

"(THE COURT): * * * Because there has been an area of disagreement between Mr. Duke and Mr. Fitzgerald in this case, I permitted a division of duties and labors in the courtroom * ,

(Tr. p. 3899, lines 13-15)

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"* * * Now, what are you going to do about counsel, Mr. Duke, if Mr. Fitzgerald withdraws at this time?

"MR. DUKE: I will proceed in propria persona, as I intended to do when I came into the case. As your Honor recalls, I made a similar motion at the beginning of the case.

"Mr. Fitzgerald volunteered his services, to come down and help me over the rough spots; not to take over the trial of the case.

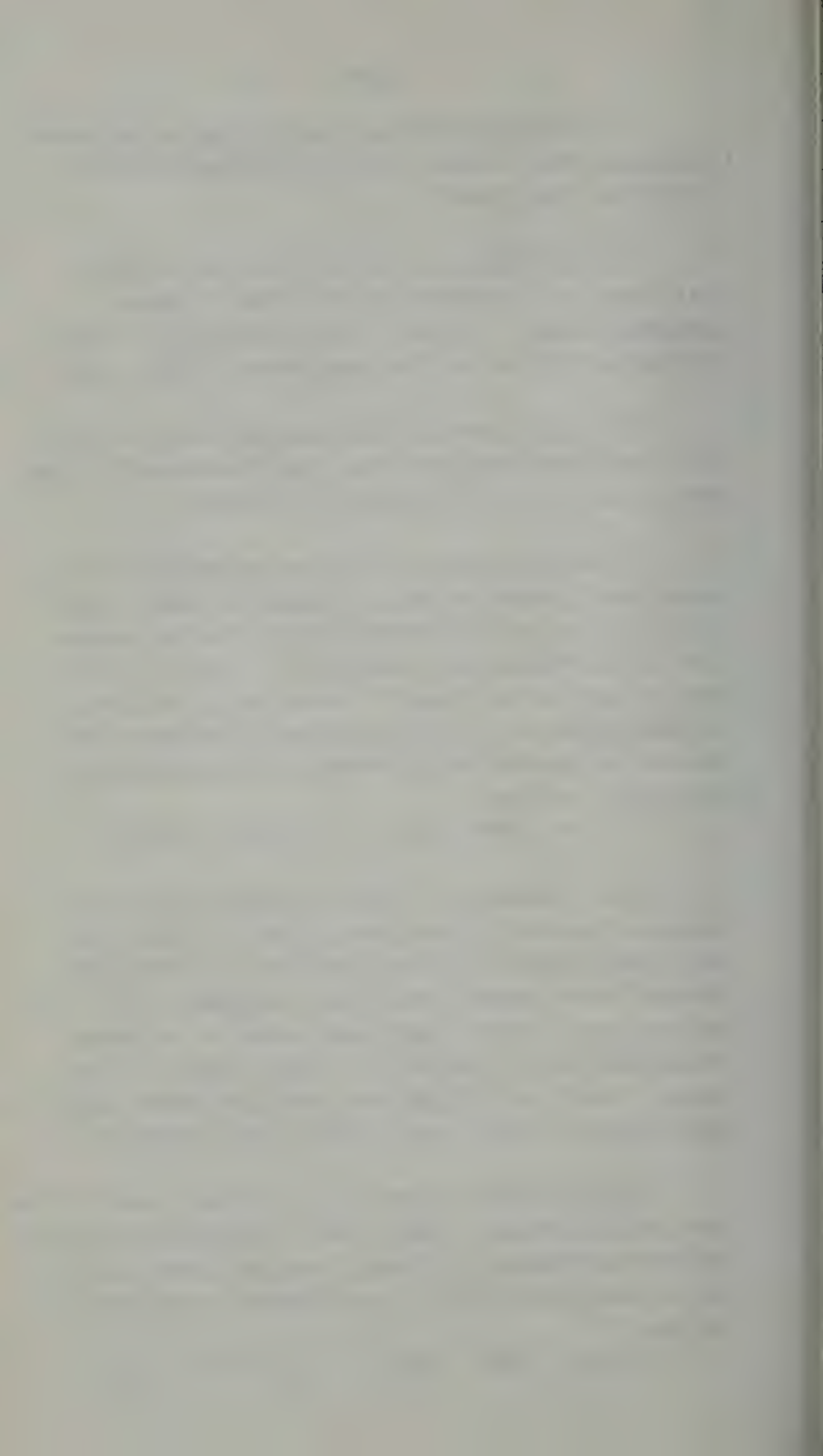
"I am sure some of these statements that have been made by Mr. Fitzgerald were made through his lack of knowledge of the evidence that I had within my command. That situation was called to the court's attention, I believe, at the beginning of the case and I believe Mr. Bowler objected to my even participating as associate counsel. "

(Tr. pp. 3899, line 22 - 3900, line 10)

"MR. WHELAN: I am mindful of the precarious position of my own client in this case, and I am mindful of the condition in which Mr. Buono finds himself and what the effect may be on the jury if this thing does come to an open break and Mr. Fitzgerald is no longer in the case. And I still think we have got some kind of a chance to win, and I don't like to see it --

"THE COURT: Could we do this, even if the motion be granted: Have Mr. Fitzgerald present in the courtroom, although not participating, in order that there be no open break to the eye of the jury. "

(Tr. pp. 3902, line 17 - p. 3903, line 2)



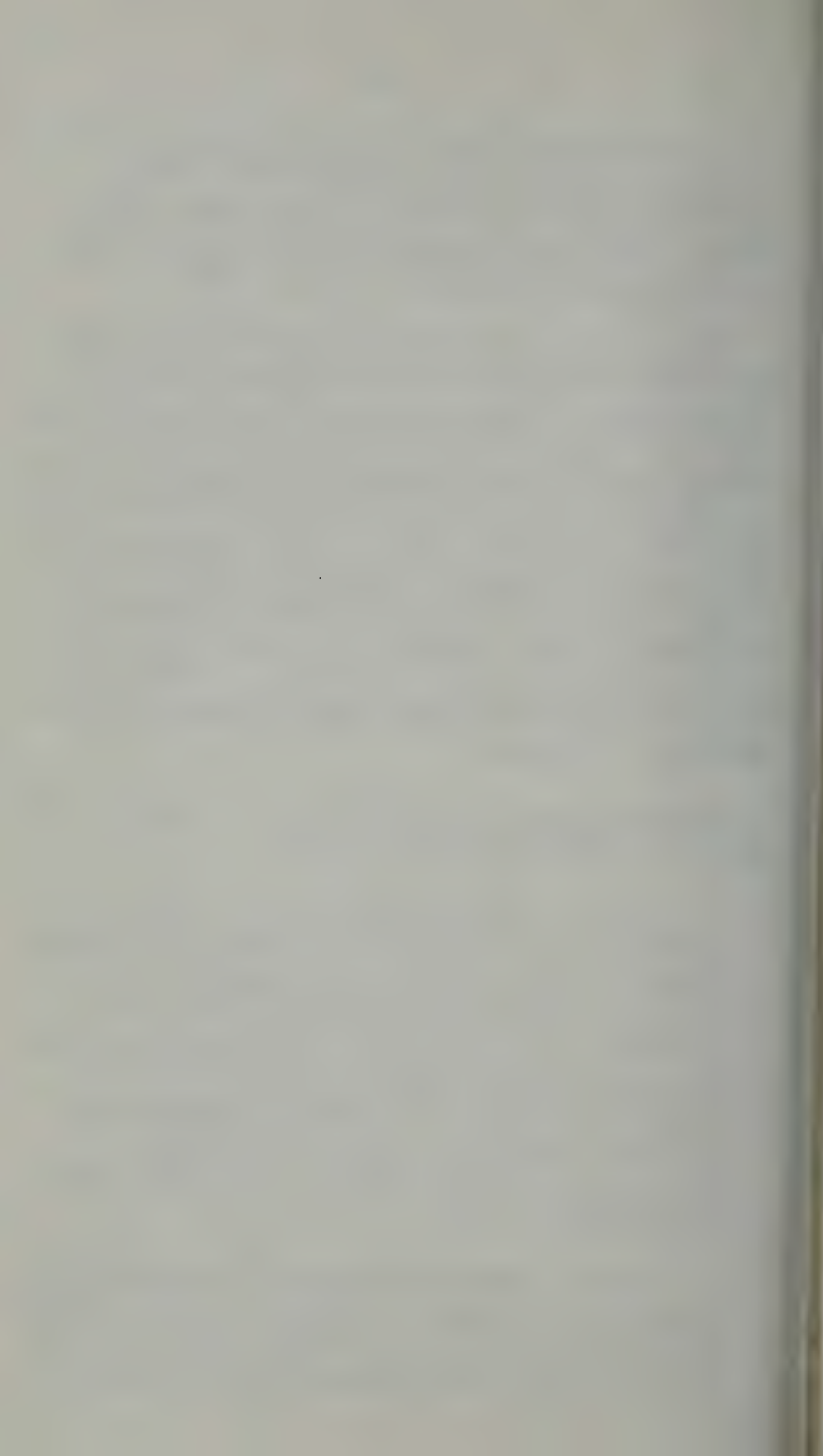
At this stage of the trial and in view of the prejudicial effect that counsel felt Mr. Fitzgerald's release would have on the other defendants, Duke and Fitzgerald tried to patch things up and go ahead together. (Tr. p. 3906)

Now, we do not propose to even inquire into the respective merits of the position of either Fitzgerald or Duke concerning their disagreement. The fact remains, they did disagree; the fact remains, that such disagreement was apparent to the court; and the fact remains, that the court recognized the prejudicial effect in the presence of the jury of Mr. Fitzgerald leaving the case at that stage; the fact remains, that Duke recognized at that time that this confusion had been the result of the original rulings at the outset of the trial when the court compelled Duke to proceed to trial with Mr. Fitzgerald.

In Glasser vs. U. S., 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680, the court stated:

"Even as we have held that the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment. * * *

"* * * The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. "

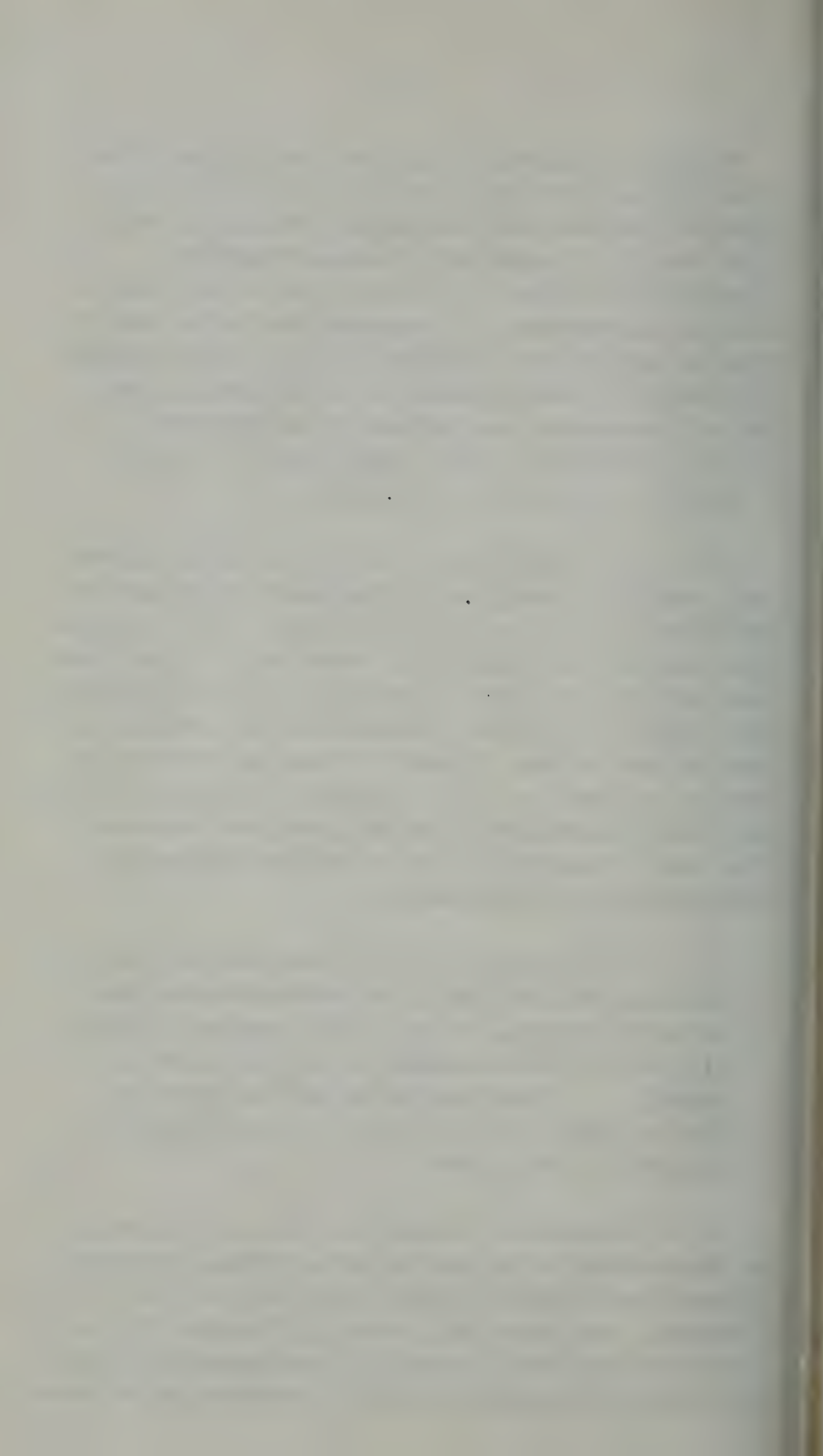


From the record it appears that at the outset Duke lacked sufficient confidence in Mr. Fitzgerald, and was not willing to proceed to trial with him if it required relinquishing full control of his case. Irrespective of the merits of this controversy, it appears that even Mr. Fitzgerald did not consider that the relationship of attorney-client existed between himself and Duke, otherwise, we believe he would have quietly withdrawn rather than publicly "spurn" a client in the middle of a trial.

In U. S. v. Mitchell, 137 F. 2d 1006, defendant therein attempted to dismiss his counsel on the second day of a three day trial. This request was denied. On appeal the defendant's conviction was upheld, the court emphasizing that defendant had failed to express a reason for his request and that he had further failed to disclose whether he wish to proceed without counsel or desired to have the trial delayed while he secured new counsel. The court, however, then made the following rather appropo observation:

"Presumably if an accused during the trial decides that he wishes to proceed alone and without delaying the trial and makes his decision with full knowledge of the risks he is taking . . . that course should be open to him in view of the fact that he must have confidence in his counsel."

It is respectfully submitted that the court had no discretion to refuse to permit Duke to defend himself and the judgment, therefore, is void. If, however, the court did have any discretion, there was an abuse which resulted in substantial prejudice and the judgment should therefore be reversed.



II.

DUKE WAS SUBSTANTIALLY PREJUDICED AND DEPRIVED OF A FAIR TRIAL BY REASON OF VARIOUS ERRORS IN THE COURT'S RULINGS AND COMMENTS, AND BECAUSE OF THE MISCONDUCT OF THE PROSECUTING ATTORNEY IN THE PRESENCE OF THE JURY, ALL OF WHICH RELATED TO A MATTER COLLATERAL TO THE ISSUES IN THE CASE.

We have previously related the circumstances with respect to the interjection into the case of the so-called "Duke special defense". We related at pages 55 and 56, *supra*, how the matter came into the trial, in the first instance, by comments from the court and prosecutor, and Mr. Fitzgerald's concurrence.

Now it is readily conceded that Duke accepted with considerable reluctance and to a very limited degree the invitation of the court, made to him in the presence of the jury. However, the precise necessity of the lengthy comment and colloquy in the presence of the jury is not readily apparent from the record. It would seem that a chambers conference outside the presence of the jury would have been more appropriate for clarification of such issues. This colloquy (Tr. pp. 3205-18) is quoted in the Appendix, Volume 4, at pages 463 to 474.

Although invited to go further, all Duke in effect said was that I know the witness John Hadzima is framing me, and I think Mr. Sankary, his wife, Wanda, some labor officials, and Mr. Vader of the Customs Agency are acting

in concert with Hadzima. (Tr. pp. 3209-10)

Duke declined to make any charges against Mr. Steward or the United States Attorney's office and expressed the thought that they were being misled. (Tr. p. 3210)

Now let us examine this business of a "special defense" of "frame up". Duke said Hadzima was framing him. There is certainly nothing special or unique about that contention because all Duke is saying is -- "I am not guilty". Here Hadzima, in his testimony, had charged Duke with criminal conduct. Duke testified that this was not true. Here we have diametrically opposed testimony. Either Hadzima or Duke deliberately and wilfully testified falsely, and there is no area for mere mistake or inadvertence. Duke says, "I am not guilty -- I am telling the truth, and Hadzima did not. "

Now Hadzima is either testifying truthfully, or he is framing Duke. There is nothing special about that. For Duke to say -- "I am not guilty but Hadzima is not framing me" would be tantamount to pleading guilty in the presence of the jury.

As far as the United States Attorney's Office is concerned, they are either participants in a frame up, or they are being misled. It is just as simple as that, because for Duke to say they are neither participants nor being misled is tantamount to his pleading guilty. Duke said they were being misled.

As for Sankary, Mr. Vader and labor officials, unnamed, Duke said he believed they were acting

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in concert with Hadzima, and Duke went on to say that Hadzima himself had made the charges.
(Tr. p. 3209)

If such was in fact the case evidence thereof would be admissible as tending to prove the bias, prejudice and corrupt motive of the witness Hadzima.

Thus, we submit that under critical analysis this label "special affirmative defense" is a complete misnomer, and irrespective of what Duke may have believed, be he justified or not in such beliefs, there was no basis or justification for giving him this separate and special classification. The specific errors assigned in connection therewith follow:

- A. It was misconduct for the prosecuting attorney to call a witness to the stand not to elicit any material evidence but solely for the purpose of disclosing to the jury that Duke had subpoenaed the witness but failed to call him to testify.

Duke had subpoenaed Morris Sankary, but did not call him as a witness. So that the jury might be advised of this, Mr. Steward called Sankary as a witness and elicited from him the fact that he had been subpoenaed by Duke but not called to testify. The examination of Sankary is quoted in part in the Appendix at pages 607-614. (Tr. pp. 3803-6) Mr. Steward was laying the foundation for what we contend was an improper argument as set forth under a separate heading below. This was error.

- B. The prosecuting attorney committed misconduct during argument to the jury in that he stated facts concerning Duke which not only were not in evidence but which were known by him not to be true; and the argument was intemperate and inflammatory and calculated to cause the jury to substitute passion and prejudice for reason in viewing the evidence as to Duke.

Particulars of the Opening Argument only of the prosecutor were assigned as misconduct and they are quoted in the Appendix at pages 657 to pages 663, and reference is made thereto. (Tr. 4433-4445) In substance, Mr. Steward told the jury that Duke had accused himself, the United States Attorney's Office, Mr. Bowler, the United States Customs Service, citizens in San Diego, and the Federal Grand Jury of participating in a conspiracy to frame Duke. (Tr. pp. 4433-4435)

Now this is just simply not true, and Mr. Steward knew it was not true. The very most that can be said is that when called upon (and not before) Duke said Hadzima was framing him, and that based on what Hadzima said, he believed Sankary and wife, Mr. Vad and some unnamed labor officials were participating. Duke expressly took the position that the United States Attorney's office, including Mr. Steward, was being misled. Now there was just no excuse for these statements. The jury having heard what Duke said in the courtroom could not help but assume that Mr. Steward was relating facts of his own knowledge of what must have occurred during one or more of the sessions outside their presence.

This was improper and in the circumstances here, highly prejudicial.

It was stated in Berger vs. United States, 295 U. S. 78, 88 (55 S.Ct. 629, 79 L. Ed. 1314):

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all . . . "

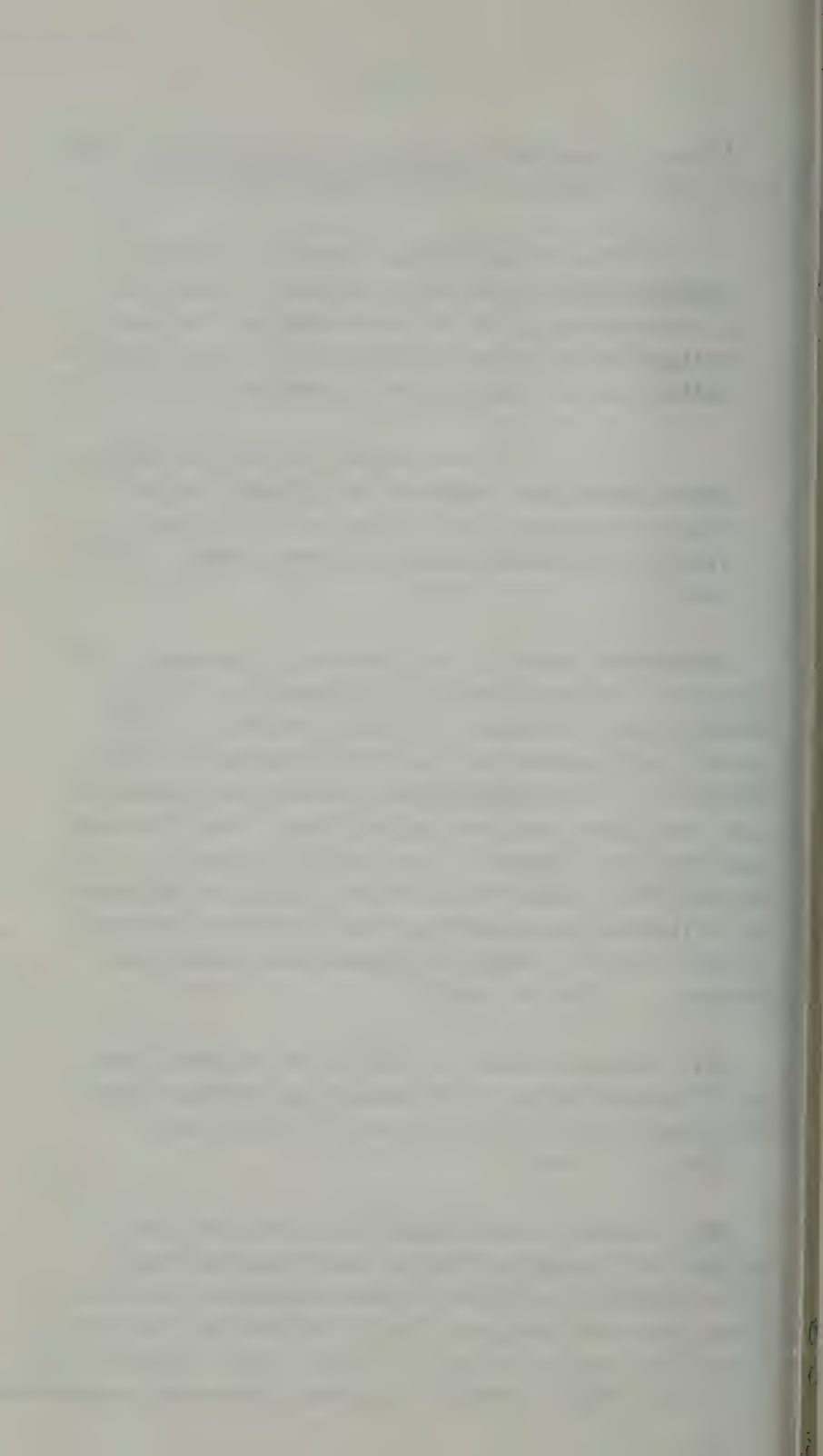
". . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. "

In another part of his Opening Argument, Mr. Steward berated Duke for failing to call Mr. Sankary as a witness. (Tr. p. 4434) In "A" above, we pointed out that Mr. Steward called Sankary to the witness stand solely to advise the jury that Duke had not called him. Mr. Steward said that he, himself, was on the witness stand as was Mr. Vader (both were called by defense for a limited purpose) and that Duke was afraid to ask either of them any questions about this frame up. (Tr. p. 4434)

Mr. Steward said it was the truth that Duke participated in the bird smuggling venture and the Grand Jury indicted him for doing that.

(Tr. pp. 4444)

Mr. Steward then outlined to the jury the subjective thoughts that he had when he was interviewing the prosecution witnesses, and in effect advised the jury that if he had not believed them, the prosecution would not have commenced. (Tr. pp. 4463 - 4464) This was improper argument.



See the following decisions of the California Supreme Court:

People vs. Pantages, 212 Cal. 239

People vs. Cook, 149 Cal. 334

The remarks of the prosecutor were assigned as misconduct. The court held that there was no misconduct, commenting, however, that it would have been better to have reserved the remarks until closing argument. (Tr. 4447-51; App.663-70)

It is respectfully submitted that the remarks of the prosecutor exceeded the bounds of propriety and had the effect of depriving Duke of a fair trial.

- C. The prosecuting attorney committed misconduct in the cross-examination of Duke by asking improper questions solely for the purpose of getting the matter before the jury.

In cross-examining Duke Mr. Steward asked the following:

" Q Isn't it also true in that conversation you were asked whether or not you knew these defendants of yours were smuggling birds ?

"A No, Mr. Steward, I wasn't asked that question.

"Q Didn't you reply in the presence of Mr. Sankary and Mr. Vader and Mr. Buono, 'I know they are smuggling birds. You know they are smuggling birds. If called to testify, I will get on the stand and lie about it'?

"A No, sir, I did not. And I will take a lie detector test, sir. "

(Tr. p. 2856: App. 454-55)

Here Mr. Steward made no effort to prove the fact stated in this question. Although he had called Mr. Sankary to the stand in order to get improper evidence before the jury, he did not question him in a proper area, i. e., complete the attempted impeachment. Mr. Vader, though available, was not even called as a witness by Mr. Steward. The question did the damage, and Mr. Steward obviously did not care about the answer. This was improper.

Berger vs. United States, 295 U. S. 78
55 S. Ct. 629

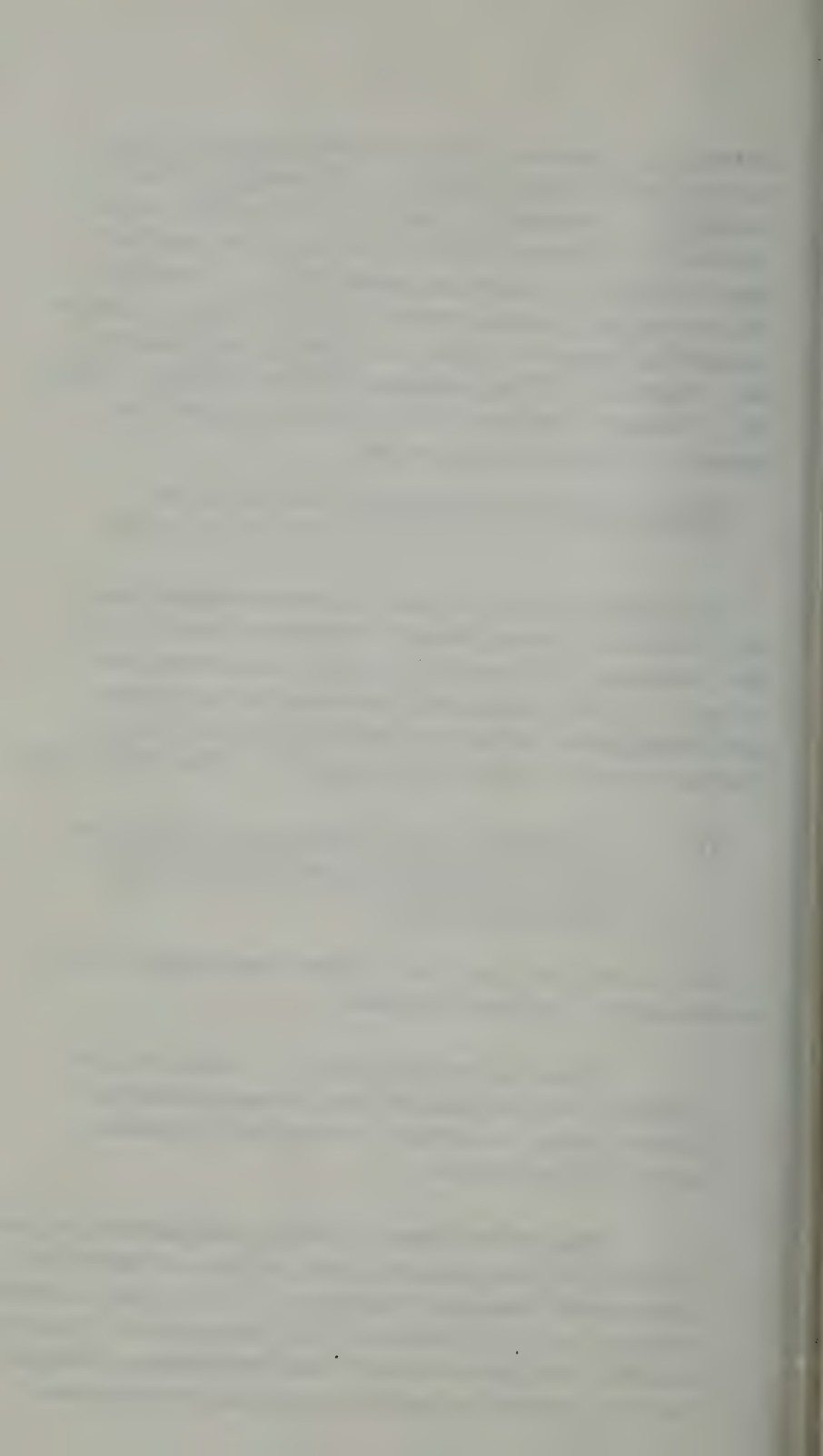
At another point in this cross-examination, Mr. Steward asked Duke a question concerning his finances. Fitzgerald object, and was sustained. Duke requested permission to answer, and Fitzgerald withdrew the objection. Mr. Steward then withdrew the question. (Tr. 4181-83)

D. The court erred while instructing the jury in commenting on the so-called "special defense"

In instructing the jury at the conclusion of all arguments, the court stated:

"It has been said here by some of the counsel that certain of the Government witnesses have, in effect, conspired together to tell false stories. . .

"But it has been strongly suggested to you by some of the counsel that certain of these witnesses did conspire together, and in that connection you should consider that accusation. Consider whether the situation of those witnesses was such that they would have the opportunity to do so.



"What access they had to each other and what lack of access they had to each other.
(Tr. p. 5089; App. 675)

Exception was taken by Duke. Although the exception only states a portion of the remarks, it appears sufficient to direct this Honorable Court's attention to the entire subject. (Tr. p. 5108)

It is submitted that it was improper to continually bring this matter before the jury to the very end of the case. Query: For what reason should the jury "consider that accusation" the court having ruled that there was no affirmative evidence to support it?

E. The court erred in refusing to admit evidence bearing on the bias, prejudice and corrupt motive of the witness Hadzima.

Duke attempted to cross-examine Hadzima to lay a foundation to prove that during the trial the witness had related a number of facts in a telephone conversation disclosing a corrupt motive in testifying in this case. The Court ordered Duke to prove the matters affirmatively in his case, and not cross-examine the witness with respect thereto. Duke complied. (Tr. pp. 956-57; App. 242-43) Thereafter, when Duke offered to prove the witness' statements affirmatively to establish facts tending to prove that the witness testified from corrupt motives, the court refused to permit the evidence to be considered for that purpose. (Tr. pp. 2035-99; App. 361-91) (Tr. pp. 2657-59; App. 452-54)

The court permitted the evidence of the witness' declarations to be considered only for the purpose

of impeaching the statements of the witness under oath, and for which a proper foundation had been laid. (Tr. pp.4291; 5100-5101) The motives, bias and prejudice of the witness Hadzima were sought to be proved by evidence of his extra-judicial declarations with reference thereto. This evidence was limited by the court to strict impeachment of Hadzima.

The testimony and offers of proof made in connection therewith, and the rulings of the court thereon are quoted verbatim in the Appendix filed in connection with this brief. In view of the fact that it would exceed the limits allowed for this brief to repeat the testimony and offers of proof verbatim here, we therefore refer to the Appendix where it appears. The appropriate official record citations are set forth in the Appendix.

1. Testimony of Buono concerning statements made to him by Hadzima.
Appendix, Vol. 3, pages 338 to 357.
2. A disc record of a telephone conversation between Duke and Buono and the witness Hadzima.
Appendix, Vol. 3, pages 361 to Vol. 4, page 39
3. Testimony of the witness Jack Hanna with respect to Hadzima's extra-judicial statements.
Appendix, Vol. 5, page 495 to page 570.

It is respectfully submitted that the offers of proof in each instance as made to the trial court, and quoted verbatim as urged, should have been accepted and the evidence received for the purpose offered.

This is especially so in view of the fact that the court expressly directed Duke to prove such matters

affirmatively instead of questioning the witness Hadzima on cross-examination to lay the foundation to prove his bias, prejudice and corrupt motive. (Tr. pp. 956-57; App. 242-243)

The rule is properly stated by the Honorable Charles W. Fricke, Judge of the Superior Court of Los Angeles County in his well known text, California Criminal Evidence, Third Edition, 1954, at page 416.

"One of the means of impeaching the testimony of a witness is by proof of his bias, motive or interest but this does not mean that without any prior foundation a party may introduce such evidence. . . . when it is sought to impeach a witness by proof of his bias, motive or interest the inquiry is not limited to matters material to the issues in the case on trial. "

F. It was error to refuse to permit proof that just prior to the trial the witness Helm was engaged in illegal conduct in violation of the laws of the United States for which he had not been prosecuted.

Helm was cross-examined with reference to his activities on July 30, 1955. On that day Helm crashed an airplane in Mexico. When the plane left the United States, it was loaded with Scotch whisky.

Helm contended that he was involved in a legal importation and produced a copy of custom document (D's. ex. J.), the original of which he stated he had signed and filed with U. S. Customs prior to departure. The document disclosed that

the whisky was being imported by a Mexican company named "Importadora de Sinaloa" and that the plane and cargo were destined for Sinaloa. Helm testified that he was actually destined for Mexicali, but that he had engine trouble and crashed in a desolate area in Mexico about three miles from the border.

Helm described his crash as a controlled crash landing, and he specifically denied that he landed, unloaded the whisky and then crashed taking off.

After Helm crashed he called Mr. Vader of the Customs service, who drove out and picked him up. Helm spent the night in Mr. Vader's home and the following day was interrogated at length by both Mr. Vader and Mr. Steward. Helm said that in 1953 and 1954 he had disclosed his smuggling activities to Mr. Vader and had discussed the subject with him during 1954 and 1955.

However, Helm said he gave his first complete statement on July 31, 1955. When asked what information he added to his July 30, 1955 statement that he had not previously told them, Helm said "regarding Vic Buono and Clifford Duke".

(Tr. pp. 1405-1407)

Evidence was offered to prove that on July 31, 1955, Helm was in fact engaged in a smuggling transaction and had filed a false declaration with U. S. Customs. That he had landed with the whisky in the desolate spot in Mexico, unloaded it and while taking off crashed.

Further proof was offered to show that the Mexican company Importadora de Sinaloa was in

fact non-existent. The prosecutor argued to the jury that this was another attempt by Duke to malign Mr. Vader, and that they had proven that the transaction was perfectly legal.

The court ruled the evidence immaterial. The testimony and offer of proof and court's rulings thereon are set out verbatim in the Appendix as follows:

Appendix, Vol. 3, pages 263 - 269
Vol. 3, pages 271 - 282
Vol. 4, pages 394 - 430
Vol. 5, pages 614 - 620
Vol. 5, pages 631 - 637

It is respectfully submitted that the evidence was material as proving the motive and bias of the witness Helm, and should have been admitted. The proper foundation was laid on cross-examination of Helm, and it was error to refuse to permit the proof to be completed.

Farkas vs. United States, 2 F. 2d 644

III.

THE COURT ERRED IN PERMITTING
HADZIMA TO HAVE THE ADVICE OF
PRIVATE COUNSEL WHILE ON THE
WITNESS STAND DURING CROSS-
EXAMINATION.

While John Hadzima was on the witness stand he was permitted, over objection, to have his private attorney, Harold Lasher, present to confer

with him. (Tr. pp. 466-67; 698-99) On his direct examination Hadzima claimed that he paid Duke sums of money in 1953 and 1954. No objection was interposed by his attorney, Mr. Lasher. On cross-examination Duke questioned Hadzima with reference to his finances during the years 1953 and 1954.

Mr. Lasher, over objection was permitted to confer with Hadzima privately while he was on the witness stand before answering the questions propounded by Duke. Objection was made that this conduct deprived the defendant of the right of cross-examination. The objection was overruled. (Tr. pp. 931-34) Furthermore, during this time Mr. Lasher made comments to the court in the presence of the jury with reference to the purpose of Duke's questions to Hadzima. (Tr. p. 934)

While Mr. Whelan was cross-examining Hadzima, Lasher interrupted, conferred with Hadzima privately, and then Hadzima stated he wished to correct a previous statement. (Tr. pp. 889-90)

The proceedings during this phase of Hadzima's cross-examination are set forth in the Appendix, beginning in Volume 2, page 224 to Volume 3, page 240. This was error. Defendants were entitled to have the testimony of the witness, not his counsel.

V.

THE JUDGMENT IN COUNTS II, III, V & VI; VIII, IX & X; IMPOSING CONSECUTIVE PUNISHMENTS SHOULD BE REVERSED BECAUSE INSUFFICIENT FACTS ARE ALLEGED IN THOSE COUNTS TO CONSTITUTE ANY OFFENSE PUNISHABLE UNDER THE LAWS OF THE UNITED STATES.

Appellant submits that the indictment on its face is fatally defective because:

1. Psittacine birds are not "merchandise which should have been invoiced." Under the Code of Federal Regulations psittacine birds could not have been imported into the United States except in the manner and under the exceptions allowed in Section 71.152 of Title 42 of the Code of Federal Regulations. Therefore, to require entry and invoicing of psittacine birds 48 hours after importation would in effect compel a person to accuse himself of a crime, to wit: a violation of the Code of Federal Regulations with reference to the importation of psittacine birds.

2. The allegation that psittacine birds were brought in contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484, is not sufficient because no fact or facts are alleged which would show unlawful importation, or a violation of these sections. Furthermore, such allegations are vague and ambiguous because Chapter 4 of Title 19 of the United States Code contains more than two hundred sections with numerous prohibitions, the violation of each of which is a crime calling for a certain

specified penalty. The penalty in some instances is a nominal fine and in others imprisonment for as long as five years.

Steiner, et al., vs. United States,

229 F. 2d 745 (C. A. 9, 1946)

Babb vs. United States, 218 F. 2d 538

U. S. vs. Kushner, 135 F. 2d 668

Sutton vs. U. S., 157 F. 2d 661

In Steiner, et al. vs. United States, *supra*, this Honorable Court approved the decision in the Babb case, *supra*, and reversed the judgment of conviction on the substantive counts, because the allegation "contrary to law" was insufficient and could not be cured by a request for a bill of particulars.

It is respectfully submitted that the allegations stating that merchandise was imported contrary to certain provisions of the United States Code is no different than the allegation "contrary to law".

CONCLUSION

For the reasons set forth in Topic I, this Appellant was deprived of his right to counsel contrary to Articles Five and Six of the Amendments to the United States Constitution, and by reason thereof, the judgment of conviction is void and should be set aside by this Honorable Court. In any event, if the court had any discretion in the matter of this Appellant's right to defend himself, certainly it was an abuse in this instance resulting in substantial prejudice, and the judgment should therefore be reversed.

Therefore, for the reasons set forth above, and for the further reasons set forth in the other errors specified, it is respectfully urged that the judgment of conviction and the order of the trial court denying the motion for new trial be reversed and set aside.

Respectfully submitted,

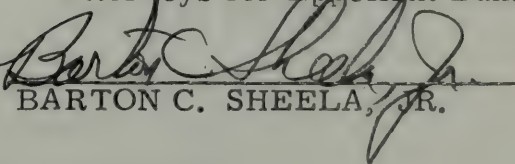
BARTON C. SHEELA, JR.

GEORGE WMS. RUTHERFORD

CLINTON F. JONES

Attorneys for Appellant Duke

By


BARTON C. SHEELA, JR.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

THOMAS WHELAN, being first duly sworn,
deposes and says:

That he is a citizen of the United States;
an attorney at law licensed to practice in the
County of San Diego, State of California with
offices at 413 Orpheum Theatre Building, San
Diego, California; that he is over the age of
eighteen years and is not a party to the above
entitled action;

That on August 20, 1956, he deposited
three copies of the Opening Brief on behalf of
Clifford L. Duke, Jr., Docket Number 15146,
in the U. S. Mail at San Diego, California
in a parcel bearing the requisite postage,
addressed to MR. HARRY STEWARD,
Assistant United States Attorney, 325 West
"F" Street, San Diego, California, his last
known address, at which place there is regu-
lar communication by United States Mail.

THOMAS WHELAN

Subscribed and sworn to before me,
this 20 day of August, 1956,

Mary Hanby Duke
Mary Hanby Duke

Notary Public in and for the
said County and State.

My commission expires June 11, 1957.

(Seal)

No. 15276-77

United States
Court of Appeals
for the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL and PA-
CIFIC RAILROAD COMPANY, UNION
PACIFIC RAILROAD COMPANY, SOUTH-
ERN PACIFIC COMPANY, GREAT
NORTHERN RAILWAY COMPANY and
NORTHERN PACIFIC RAILWAY COM-
PANY,

Appellants,

vs.

ALOUETTE PEAT PRODUCTS, LTD., et al.,
Appellees.

INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

ALOUETTE PEAT PRODUCTS, LTD., et al.,
Appellees.

Transcript of Record

Appeals from the United States District Court for the
Western District of Washington,
Northern Division

FILED

FEB 27 1957

PAUL P. O'BRIEN, CLERK



No. 15276-77

United States
Court of Appeals
for the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL and PA-
CIFIC RAILROAD COMPANY, UNION
PACIFIC RAILROAD COMPANY, SOUTH-
ERN PACIFIC COMPANY, GREAT
NORTHERN RAILWAY COMPANY and
NORTHERN PACIFIC RAILWAY COM-
PANY, Appellants,
vs.

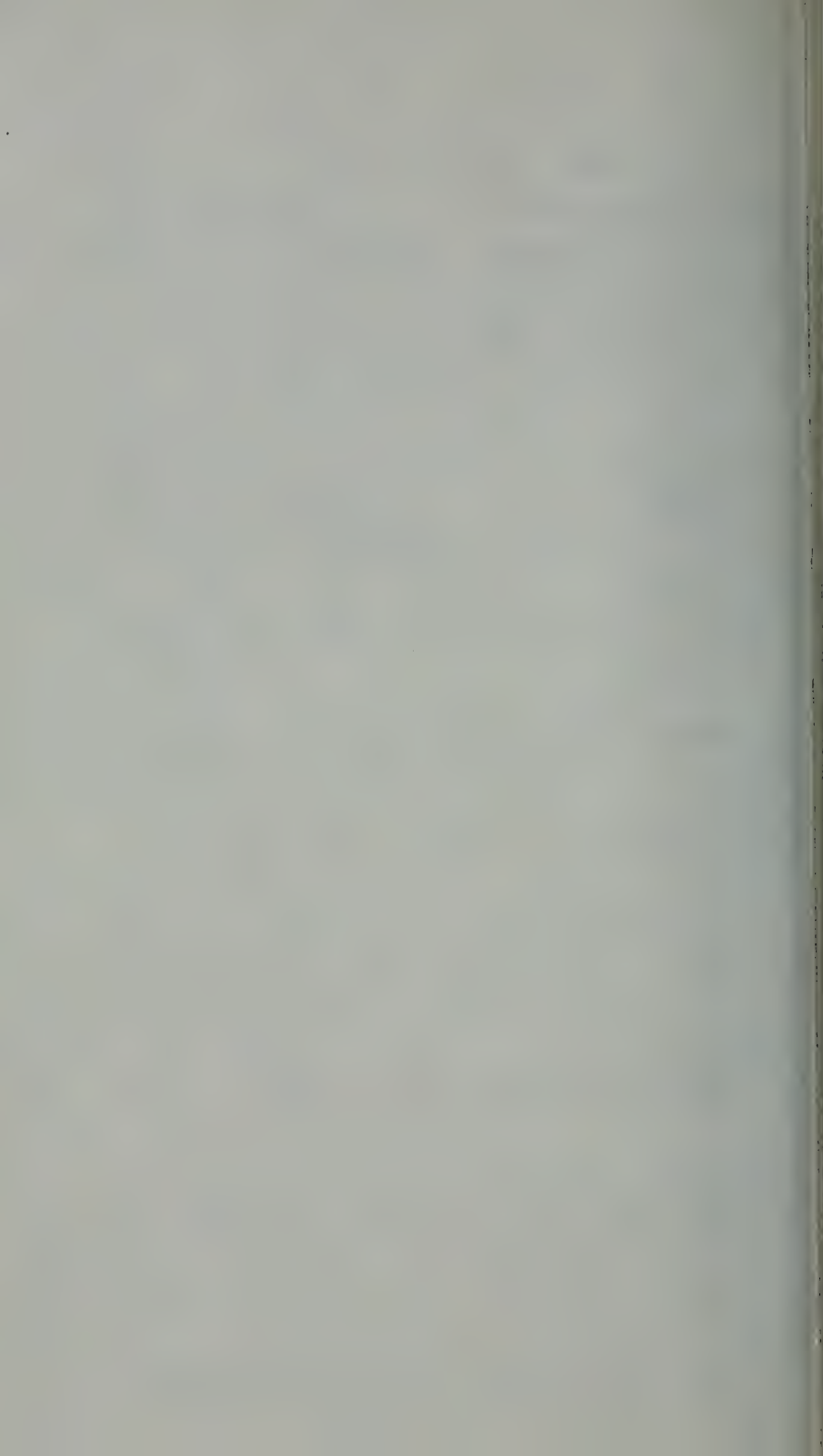
LOUETTE PEAT PRODUCTS, LTD., et al.,
Appellees.

INTERSTATE COMMERCE COMMISSION,
Appellant,
vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Seattle 4, Washington,
Attorneys for Appellees.

In the District Court of the United States, Western District of Washington, Northern Division

No. 3923

ALOUETTE PEAT PRODUCTS, LTD.,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

Comes now the plaintiff and alleges as follows:

I.

At all times mentioned herein plaintiff was and now is a corporation existing under the laws of the Dominion of Canada, and was and now is engaged in the marketing of peat, and had and has its mailing address and place of business at McTavish Road, Pitt Meadows, B. C.

II.

That this action is brought under the laws of the United States of America regulating Commerce, and particularly the Interstate Commerce Act, 49 U.S.C.A. Section 1 et seq. and 28 U.S.C.A. Section 1336. That this action is brought for the purpose of having this Court review the decision and Orders of the Interstate Commerce Commission set forth in Paragraph V below, and to set the said decisions and Orders aside.

III.

These proceedings originated in a complaint filed by the above named plaintiff with the Interstate Commerce Commission on May 31, 1949, under I.C.C. Docket No. 30260. That the said Complaint was filed against the following named common carriers:

The Atchison, Topeka and Santa Fe Railway Company,

Canadian Pacific Railway Company,

Chicago, Burlington & Quincy Railroad Company,

Chicago, Great Western Railway Company,

Chicago, Indianapolis and Louisville Railway Company,

Chicago and North Western Railway Company,

The Chicago, Rock Island and Pacific Railway Company,

The Chicago, Rock Island and Pacific Railway Company (Joseph B. Fleming and Aaron Colnon, Trustees),

Chicago, St. Paul, Minneapolis and Omaha Railway Company,

Great Northern Railway Company,

Minneapolis, Northfield and Southern Railway Company,

Minneapolis, St. Paul & Sault Ste. Marie Railway Company,

Missouri Pacific Railroad Company (Guy A. Thompson, Trustee),

Modesto and Empire Traction Company,

Northern Pacific Railroad Company,

Northwestern Pacific Railroad Company,

Pacific Electric Railway Company,
Petaluma and Santa Rosa Railroad Company,
Southern Pacific Company,
Union Pacific Railroad Company.

That the said Complaint, being I.C.C. Docket No. 30260, charged the defendants therein with assessing rates in violation of Sections 1, 3, and 6 of the Interstate Commerce Act, as amended. That the said Complaint prayed that the defendant carriers be ordered to refund overcharges to the complainant.

IV.

That a Stipulation was made and entered into between the parties to I.C.C. Docket No. 30260, that the Complaint be submitted to the Interstate Commerce Commission for decision and that the Interstate Commerce Commission may decide the issues defined by the pleadings on the record made in I.C.C. Docket No. 29974, Acme Peat Products, Ltd., et al., vs. The Akron, Canton and Youngstown Railway Company, et al. That the said Stipulation was dated August 17, 1949, and pursuant to such Stipulation the above named complaint was submitted on the record made in I.C.C. Docket No. 29974. That the Complaint in I.C.C. Docket No. 29974 was set for hearing by the Interstate Commerce Commission and notice of said hearing was given, and the said hearing was commenced at the City of Seattle, Washington, on the 10th day of November, 1948, before George J. Hall, one of the examiners of the said Interstate Commerce Commission. That plaintiffs therein appeared at said hearing by their

attorney. That witnesses were sworn and evidence taken and exhibits admitted at the said hearing, and the said hearing was concluded on November 10, 1948. That, thereafter, briefs were filed by complainants and defendants, and, thereafter, a proposed report was issued by examiners George J. Hall, and L. H. Dishman of the Interstate Commerce Commission. That the said proposed report found that complainants' Complaint before the Interstate Commerce Commission should be dismissed. That, thereafter, complainants filed Exceptions to the proposed report, and defendants filed their Reply to Exceptions of Complainants. That oral argument was had before the Interstate Commerce Commission at Washington, D. C. on November 17, 1949.

That pursuant to the aforesaid record made in I.C.C. Docket No. 29974, the Interstate Commerce Commission, on April 7, 1950, entered its Findings and Conclusions and Order in I.C.C. Docket No. 30260, said Order awarding reparations to complainant and granting relief to complainant as prayed for in its Complaint filed with the Interstate Commerce Commission. That a true copy of the said Findings and Conclusions and Order of April 7, 1950, is attached hereto as Exhibit A and is hereby made a part hereof as if set forth at length herein.

That, thereafter, and in accordance with the Rules of the Interstate Commerce Commission, defendants filed their Petition for Reconsideration by the Entire Commission and for Argument, and

omplainant filed its Reply thereto. That on the
th day of January, 1952, the Interstate Commerce
ommission issued its decision and Order denying
efendants' Petition for Reconsideration by the
ntire Commission and for Oral Argument. That
true copy of the said Order of January 7, 1952,
attached hereto as Exhibit B and is hereby made
part hereof as if set forth at length herein.

That, thereafter, and on the 30th day of Decem-
er, 1953, the Interstate Commerce Commission is-
ued its Supplemental Order ordering defendant
arriers listed in said Order to pay unto the Com-
plainant, on or before February 19, 1954, the
amounts set opposite their respective names in the
foresaid Order of December 30, 1953. That a true
copy of the said Order of December 30, 1953, is
attached hereto as Exhibit C and is hereby made
part hereof as if set forth at length herein.

V.

That, thereafter, defendants in I.C.C. Docket No.
0260 filed with the Interstate Commerce Commis-
sion a Petition For Leave to File Petition to Re-
open and Reconsider, and their Petition To Reopen
for Reconsideration, said Petitions being dated
April 16, 1954. That on June 21, 1954, the Inter-
state Commerce Commission issued its Order grant-
ing the defendants' Petition For Leave To File,
and the Commission reopened the said proceedings
for reconsideration. That a true copy of the said
Order of June 21, 1954, is attached hereto as Ex-
hibit D and hereby is made a part hereof as if

set forth at length herein. That complainant's request for oral argument upon defendants' Petition To Reopen For Reconsideration was denied. That on October 4, 1954, the Interstate Commerce Commission issued its Findings and Conclusions and Order denying relief to complainant and dismissing complainant's Complaint. That a true copy of said Findings and Conclusions and Order of October 4, 1954, is attached hereto as Exhibit E and is hereby made a part hereof as if set forth at length herein. That, thereafter, complainant filed its Petition for Reconsideration of the Commission's decision dated October 4, 1954, and the defendants replied to the said Petition. That on January 3, 1955, the Interstate Commerce Commission issued its Order denying plaintiff's Petition For Reconsideration. That a true copy of said Order of January 3, 1955, is attached hereto as Exhibit F and is hereby made a part hereof as if set forth at length herein.

VI.

That the Interstate Commerce Commission erred in making and entering its Order of June 21, 1954, granting defendants' Petition For Leave To File Petition To Reopen and Reconsider, and the Interstate Commerce Commission erred in reopening the said proceedings and in entertaining the defendants' Petition To Reopen For Reconsideration. That the Commission was without authority of law and was without jurisdiction in entering the order of June 21, 1954, as follows:

1. That the said Commission had no authority to reconsider its Final Order;
2. That the reconsideration was contrary to the established rules of procedure of the said Commission;
3. That some or all of defendant carriers were in default at the time the said Order of June 21, 1954 was granted;
4. That the reconsideration by the Commission denied to plaintiff due process of the law.

VII.

That the Findings and Conclusions and Order entered by the Interstate Commerce Commission on October 4, 1954, and the Order of January 3, 1955, denying a reconsideration to plaintiff, were and are, and each of them is unlawful and based on a misapplication of law and were and are otherwise arbitrary, capricious, and without support in and contrary to the law and the evidence, and that the Conclusions in the Order of October 4, 1954, were and are not supported by the Findings, and that the Findings in the said Order of October 4, 1954 were and are not supported by any substantial evidence whatsoever. Plaintiff more specifically shows for grounds of review as follows:

1. There is no evidence, or no substantial evidence, in the record to support the Finding of Fact of the Commission as set forth on Sheet 6, last full paragraph, and paragraph on bottom of Sheet 6 and top of Sheet 7 that there is no evidence of

unreasonableness in the assailed rates. That the Commission erred in failing to find that the assailed rates were unreasonable.

2. There is no evidence, or no substantial evidence, in the record to support the Finding of Fact of the Commission as set forth on Sheet 2, last paragraph, and in the paragraph on the bottom of Sheet 6, and the top of Sheet 7 that there is no showing of undue prejudice. That the Commission erred in failing to find that the actions of the defendant carriers, in publishing rates contravening an Order of the Commission and/or publication of said rates on short notice without authority created undue prejudice to the Complainant.

3. That the conclusion of the Commission, as set forth on Sheet 2, first full paragraph, and paragraph at the bottom of Sheet 6, and the top of Sheet 7 that the assailed rates are applicable is contrary to law and the whole of the evidence.

4. That the conclusion of the Commission, as set forth on Sheet 3, first full paragraph, that improper tariff publication does not give rise to unreasonableness is contrary to law and the whole of the evidence, and denies to this plaintiff due process of the law.

5. That the conclusion of the Commission as set forth on Sheet 3, first full paragraph, and Sheet 2, first full paragraph, that reparations are not allowable for improper tariff publication, is contrary to law and the whole thereof of the evidence, and denies plaintiff herein the due process of law.

6. The Commission erred in failing to find that publication of rates by defendant carriers, without proper statutory notice, makes the rates inapplicable to plaintiff.

7. The Commission erred in concluding as a matter of law that complainant's Complaint be dismissed upon the ground that the Commission made no finding that the assailed rates were reasonable and the said Order of October 4, 1954, is not supported by any Finding of Fact that the rates assailed were reasonable.

8. That the Commission erred in failing to give due and proper consideration to the Findings and Conclusions and Final Order entered by the Commission on April 7, 1950, and erred in reversing said Findings and Conclusions and Order of April 7, 1950, in that the said Findings, Conclusions and Order of April 7, 1950, were each and all supported by substantial evidence and in accordance with the law.

9. That the Commission erred in entering its Order of October 4, 1954, and the whole thereof herein, upon the ground that said Order, and the whole thereof, is unsupported by Conclusions of Law, and Findings of Fact supported by substantial evidence upon the record considered as a whole, and is contrary to law.

Wherefore, plaintiff prays this Honorable Court as follows:

1. That this Court take jurisdiction of the proceedings, and of the questions determined therein,

and that this Court review all of the said records and proceedings had by the Interstate Commerce Commission in this matter, including the record had and made in I.C.C. Docket No. 29974, said record and proceeding being made a part of this record by stipulation of the parties; that the Court make and enter its Order and Decree that the said Orders of June 21, 1954, October 4, 1954, and January 3, 1955, made by the said Interstate Commerce Commission, be annulled, vacated, and set aside; that this Court make and enter its Decision and Order awarding reparation to plaintiff of all sums charged by the common carriers listed in Paragraph III herein, in excess of the rates legally chargeable by said carriers, and make and enter herein Findings of Fact, and Conclusions of Law, and Decision consistent and in accordance with the evidence and the law in this cause; that the Court further make such decision and Order as shall be appropriate in the premises.

2. That this Court make and enter its Order directed to the Interstate Commerce Commission requiring the said Interstate Commerce Commission to certify fully to this Honorable Court, at a specified time and place, all of the records and proceedings of the said Interstate Commerce Commission in the said ICC Docket No. 30260, and also the record made in I.C.C. Docket No. 29974, made a part of the record of ICC Docket No. 30260 by due stipulation of the parties thereto, including all Orders and decisions therein, the transcript of all testimony, together with all the exhibits or copies

hereof introduced, and the written briefs filed by the parties herein, and the transcript of oral argument had before the said Commission, and the pleadings, and all files, filings, correspondence, records and proceedings in the said cause, to the end that they may be made a part of the record before the said Commission.

This Court, so that this Court may review the law.

3. Plaintiff further prays for its costs and disbursements herein.

WRIGHT, BOOTH & BERESFORD

/s/ ROBERT O. BERESFORD and

/s/ By JOANN R. LOCKE,

Attorneys for Plaintiff

[Endorsed]: Filed April 15, 1955.

Title of District Court and Cause No. 3923.]

MOTION FOR LEAVE TO INTERVENE

Come Now the Union Pacific Railroad Company, Southern Pacific Company, Great Northern Railway Company and Northern Pacific Railway Company, and pursuant to Title 28, Section 2323, petition the Court for an order granting leave to the above named petitioners to intervene herein as defendants, and in support thereof show the Court as follows:

I.

That each of the above named petitioners operates a line of railroad as a common carrier in inter-

state commerce and as such is subject to regulation by the Interstate Commerce Commission under Part I of the Interstate Commerce Act.

II.

That each of the above named petitioners were parties defendant in the cause No. 30260 entitled Alouette Peat Products, Ltd., vs. The Atchison, Topeka and Santa Fe Railway Company, et al., lately pending before the Interstate Commerce Commission.

III.

That the purpose of this action is to have this Court annul, vacate and set aside the final order of the Interstate Commerce Commission entered in said Cause No. 30260 dismissing plaintiff's complaint against your petitioners, and therefore your petitioners have a direct and substantial interest in this proceeding.

/s/ HAROLD G. BOGGS

/s/ ROBERT F. GARING

/s/ R. PAUL TJOSSEM

Attorneys for Petitioners

Acknowledgment of Service attached.

[Endorsed]: Filed April 29, 1955.

[Title of District Court and Cause No. 3923.]

ORDER GRANTING LEAVE TO INTERVENE

This cause coming on to be heard on the 29th day of April, 1955 on the petition of Union Pa-

cific Railroad Company, Southern Pacific Company, Great Northern Railway Company and Northern Pacific Railway Company, for leave to intervene in the above entitled suit and to be made party defendants thereto, and the petition having been duly considered, and it appearing to the Court that the above named petitioners have an interest in the above entitled suit sufficient to warrant each of them becoming a party to this suit, it is therefore,

Ordered, Adjudged and Decreed that the Union Pacific Railroad Company, Southern Pacific Company, Great Northern Railway Company and Northern Pacific Railway Company be, and each of them hereby is granted leave to intervene in said suit as a party defendant.

Dated this 29th day of April, 1955.

/s/ GEO. H. BOLDT,

United States District Judge

Presented by:

/s/ R. PAUL TJOSSEM

Of Attorneys for Petitioners

Acknowledgment of Service Attached.

[Endorsed]: Filed April 29, 1955.

In the District Court of the United States, Western District of Washington, Northern Division

No. 3923

ALOUETTE PEAT PRODUCTS, LTD.,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant,
and

UNION PACIFIC RAILROAD COMPANY, a
corporation, SOUTHERN PACIFIC COMPANY, a corporation, GREAT NORTHERN RAILWAY COMPANY, a corporation, and NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Intervening Defendants.

ANSWER OF INTERVENING DEFENDANT RAILROADS

Come now the Union Pacific Railroad Company, Southern Pacific Company, Great Northern Railway Company and Northern Pacific Railway Company, intervening defendants, and answer the complaint of the plaintiff herein as follows:

I.

Admit the allegations in paragraphs I and II of said complaint.

II.

Admit the allegations of paragraph III of said

complaint, and allege that these defendants in publishing and charging the rates therein described did not and have not violated any provision of the Interstate Commerce Act, 49 U.S.C.A. Sections 1, 3, and 6, as amended, or any order of the Interstate Commerce Commission entered pursuant hereto.

III.

Admit the allegations in paragraphs IV and V of plaintiff's complaint.

IV.

Deny each and every allegation contained in paragraphs VI and VII of plaintiff's complaint.

Wherefore, having fully answered the complaint of the plaintiff herein, these intervening defendants pray that judgment be entered affirming the orders of the Commission entered in said cause, I.C.C. Docket No. 30260, dated October 4, 1954 and January 3, 1955; that the plaintiff take nothing by its complaint in this cause; that the same be dismissed; and that these intervening defendants be awarded their costs and disbursements incurred in defending this cause; and that the Court grant such other and further relief as in the premises appears equitable and just.

/s/ HAROLD G. BOGGS

/s/ ROBERT F. GARING

/s/ R. PAUL TJOSSEM

Attorneys for Intervening

Defendant Railroads

Acknowledgment of Service attached.

[Endorsed]: Filed June 2, 1955.

[Title of District Court and Cause No. 3923.]

ANSWER OF THE UNITED STATES OF
AMERICA

Now comes the United States of America, as defendant herein, and in answer to the Complaint says:

I.

This is a Complaint seeking to set aside an order of the Interstate Commerce Commission. The Interstate Commerce Act contains provisions adequate for the protection of the Commission's orders at the hands of the Commission and of the railroads, when as here, they are the real parties in interest [28 U.S.C.A. Sec. 2323].

II.

The Commission's order challenged herein involves the same parties, the same disputes, and the same claims for money damages as were involved in the proceedings before the Commission. The interested governmental agency, i.e., the Interstate Commerce Commission, will avail itself of the statutory authorization to interpose all defenses to the shipper's charges and claims possible of being interposed. Thus the Commission, and the railroads, if they so elect, will have an opportunity to present their respective positions through their own counsel. Under these circumstances, and in view of these facts, the United States does not oppose the Commission's order, but does not participate in its defense.

III.

Accordingly, the United States neither admits nor denies any of the allegations of the Complaint.

STANLEY N. BARNES,
Assistant Attorney General
CHARLES P. MORIARTY,
United States Attorney
/s/ F. N. CUSHMAN,
Assistant U. S. Attorney
/s/ JAMES E. KILDAY,
/s/ JOHN H. D. WIGGER,
Special Assistants to the
Attorney General
Attorneys for the United States
of America

Certificate of Service attached.

[Endorsed]: Filed June 15, 1955.

[Title of District Court and Cause No. 3923.]

INTERVENTION AND ANSWER OF INTER-
STATE COMMERCE COMMISSION

Comes now the Interstate Commerce Commission and pursuant to the provisions of U. S. Code, Section 2323 (28 U.S.C. 2323), hereby intervenes as of right as a party defendant in the above-entitled cause, enters the appearance of its counsel therein, and for answer to plaintiff's complaint, says:

First Defense

This Court lacks venue to entertain this suit be-

cause Title 28 U. S. Code, Section 1398, specifically provides that "any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action", and nowhere in the complaint is it alleged that plaintiff has its residence or principal office within the judicial district in which this suit is brought. On the contrary it is alleged in the first paragraph of the complaint herein that plaintiff is a Canadian corporation engaged in the marketing of peat, with address in the city in British Columbia, Canada, referred to in paragraph I of said complaint; therefore, plaintiff is without standing to maintain this suit.

Second Defense

Without waiving its foregoing defense, and further answering the plaintiff's complaint herein, the Commission answers and says:

I.

Answering the allegations of paragraphs I, II and III of the plaintiff's complaint herein, the Commission admits the same.

II.

Answering the allegations of paragraph IV of the plaintiff's complaint, the Commission admits that the stipulation was entered into between the parties to Docket I.C.C. No. 30260 as alleged in said paragraph and that hearings were held before

its examiner as alleged and that a proposed report was issued containing a recommendation that plaintiff's complaint should be dismissed. It is also admitted that following the filing of exceptions to the proposed report and replies to exceptions that oral argument was had before the Commission as alleged. It is further admitted that on April 7, 1950, Division 2 of the Commission served its report and order finding that the assailed rates were applicable but were unjust and unreasonable and concluded that plaintiff was entitled to an award of reparations based upon the findings contained in its said report (277 I.C.C. 641), to which the Court is referred for a full, true and accurate statement of such findings and conclusions. The remaining allegations of said paragraph are admitted.

III.

Answering the allegations of paragraph V of plaintiff's complaint herein, the Commission admits that on June 21, 1954, pursuant to petitions for reopening and reconsideration filed by the railroads, that said proceedings were reopened for reconsideration as alleged and that plaintiff's request for oral argument was denied. It is further admitted that on October 4, 1954, the entire Commission by its report on reconsideration denied the relief sought in plaintiff's complaint, as alleged in said paragraph, and that plaintiff's petition for reconsideration of said order of October 4, 1954, was denied by the Commission on January 3, 1955.

IV.

Answering the allegations of paragraph VI of the plaintiff's complaint herein, the Commission denies that it erred in making and entering its order of June 21, 1954, or that it acted beyond the scope of its authority and jurisdiction for any of the reasons alleged in said paragraph or for any other reason or reasons.

V.

Answering the allegations of paragraph VII of plaintiff's complaint, the Commission denies that the orders referred to therein are unlawful and are based on misapplication of law and are arbitrary and capricious and without support in the law, and denies that its said order of October 4, 1954, is not supported by adequate findings and conclusions and substantial evidence and further denies that its said order is invalid for any of the reasons stated in said paragraph or for any other reason or reasons.

Answering paragraph 2 of plaintiff's prayer (complaint pages 10-11), the Commission avers that there is no statutory requirement that the Court issue an order directing the Commission to prepare and certify the records and proceedings had before it in Docket I.C.C. No. 30260 as part of the record to be presented to this Court for its review of the actions of the Commission in this cause. In this connection the Commission avers that it is the duty and obligation of plaintiff to obtain the

record from the Commission (Wilson v. United States, 114 F. Supp. 814, 821; Mississippi Valley Barge Co. v. United States, 292 U. S. 282, 286-287) for introduction in Court, and the Commission also avers that upon request of plaintiff and the payment by it of a nominal fee to cover the cost of preparation, a certified copy of the record may be obtained from the Secretary of the Commission for that purpose. (Section 1006(d), Title 5 U.S.C.)

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the complaint, insofar as they conflict with the allegations herein.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct and hereby prays that said complaint be dismissed.

INTERSTATE COMMERCE
COMMISSION,

/s/ By SAMUEL R. HOWELL,
Associate General Counsel

Certificate of Service attached.

[Endorsed]: Filed June 16, 1955.

In the District Court of the United States, Western District of Washington, Northern Division

No. 3924

ACME PEAT PRODUCTS, LTD.,
ALOUETTE PEAT PRODUCTS, LTD.,
ATKINS & DURBROW, LTD.,
BLUNDELL PEAT CO.,
BYRNE ROAD PEAT FARMS,
COAST PEAT CO., LTD.,
EXCELSIOR PEAT CO., LTD.,
LULU ISLAND PEAT CO., LTD.,
NORTHERN PEAT MOSS CO., LTD.,
PACIFIC PEAT PRODUCTS, LTD.,
RICHMOND-PEAT PRODUCTS, LTD.,
SHAFFER-HAGGART, LTD.,
WESTERN PEAT CO., LTD., Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

No. 3923

ALOUETTE PEAT PRODUCTS, LTD.,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

STIPULATION FOR CONSOLIDATION

It is hereby stipulated and agreed to by and between plaintiffs in the two above entitled actions,

acting by and through their attorneys, Wright, Booth & Beresford; and the defendant, United States of America, in the above entitled actions; and the intervenors, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Union Pacific Railroad Company, Southern Pacific Company, Great Northern Railway Company, and Northern Pacific Railway Company, acting by and through Harold G. Boggs, Robert F. Garing, and R. Paul Tjossem, their attorneys; and intervenor, Interstate Commerce Commission, acting by and through Samuel R. Howell, Associate General Counsel, its attorney; that the two above entitled causes be consolidated into one action in this Court, for the reason that the said actions contain common questions of law and fact and for the reason that the above numbered action, No. 3923, was heard below before the Interstate Commerce Commission upon the record made in the above numbered action, No. 3924.

Dated at Seattle, Washington, this 24th day of June, 1955.

/s/ JOANN R. LOCKE,

Of Wright, Booth & Beresford,

Attorneys for Plaintiffs, Acme Peat Products, Ltd., et al., and Alouette Peat Products, Ltd.

UNITED STATES DISTRICT
ATTORNEY,

/s/ By F. N. CUSHMAN,

Assistant U. S. Attorney

INTERSTATE COMMERCE
COMMISSION,

/s/ By SAMUEL R. HOWELL,
Associate General Counsel

/s/ R. PAUL TJOSSEM,

Of Attorneys for Intervenors, Chicago, Milwaukee,
St. Paul and Pacific Railroad Company; Union
Pacific Railroad Company; Southern Pacific
Company; Great Northern Railway Company;
Northern Pacific Railway

[Endorsed]: Filed July 29, 1955.

[Title of District Court and Causes 3923 and 3924.]

ORDER CONSOLIDATING ACTIONS

This matter having come on regularly for hearing on this day and date before the undersigned, one of the judges of the above captioned court, upon the Stipulation of the parties to the above entitled action for consolidation of the said action, and it appearing to the Court that the said actions involve common questions of law and fact and that the action above numbered 3923 was heard before the Interstate Commerce Commission upon the record made in the action above numbered 3924, and it appearing that it is to the interest of all parties that said actions should be consolidated and good cause appearing therefor,

It Is Hereby Ordered, Adjudged and Decreed that the above captioned causes of action be and

they are hereby consolidated into one action in this Court.

Done in Open Court this 29th day of July, 1955.

/s/ GEO. H. BOLDT,
United States District Judge

Presented by:

/s/ JOANN R. LOCKE,
Of Wright, Booth & Beresford,
Attorneys for Acme Peat Products, Ltd., et al., and
Alouette Peat Products, Ltd.

Approved by:

UNITED STATES DISTRICT
ATTORNEY,

/s/ By F. N. CUSHMAN,
Assistant U. S. Attorney

Approved by:

/s/ R. PAUL TJOSSEM,
Of Attorneys for Intervenor, Chicago, Milwaukee,
St. Paul and Pacific Railroad Company; Union
Pacific Railroad Company; Southern Pacific
Company; Great Northern Railway Company;
Northern Pacific Railway

INTERSTATE COMMERCE
COMMISSION,

/s/ By SAMUEL R. HOWELL,
Associate General Counsel

[Endorsed]: Filed July 29, 1955.

[Title of District Court and Causes 3923 and 3924.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on duly and regularly for trial on the 12th day of June, 1956, before the undersigned Judge of the above-entitled court; and said causes above having been consolidated by order of Court duly made and entered on the 29th day of July, 1955 pursuant to stipulation between all parties; and the plaintiffs in both causes being represented in court by their attorneys, Robert O. Beresford and JoAnn R. Locke of the firm of Wright, Booth & Beresford, and Fred H. Tolan; and the defendant United States of America being represented in court by John A. Roberts, Jr., Assistant United States Attorney; and the intervening Defendant, the Interstate Commerce Commission, being represented in court by John A. Roberts, Jr.; and the intervenor railroads, Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Union Pacific Railroad Company; Southern Pacific Company; Great Northern Railway Company; and Northern Pacific Railway, being represented in court by and through their attorney, R. Paul Tjossem, and the defendant, United States of America, having, by its answer filed herein, taken a neutral position in this action, and the intervening defendant, the Interstate Commerce Commission having submitted their case on written brief and having, through their attorney, John A. Roberts, Jr., tendered in open court oral argument of

he above-captioned actions to the intervenor railroads, acting by and through their attorney, R. Paul Tjossem; and the transcript of all of the proceedings before the Interstate Commerce Commission having been filed in the above-captioned proceedings and having been produced by the plaintiffs, being duly and regularly introduced as exhibits in the above-captioned causes; and no further testimony having been taken or evidence introduced by any party to the action; and the Court having heard oral argument, and being familiar with the records and files herein, and having heretofore announced its oral decision, herewith makes the following

Findings of Fact

I.

That the Court has jurisdiction over the subject matter of this action and the parties hereto under and by virtue of the laws of the United States of America regulating commerce, and in particular the Interstate Commerce Act, 49 U.S.C.A. Section , et seq., and 28 U.S.C.A. Section 1336.

II.

That this action is brought for the purpose of having this Court review the decision and orders of the Interstate Commerce Commission, as more particularly hereinafter set forth.

III.

That the defendant, the United States of America, and the intervening defendant, the Interstate

Commerce Commission, have, in open court, waived any issue with regard to the venue as presented by these cases. That no issue of venue was raised on behalf of the intervenor railroads by their Answer in this case.

IV.

That at all times herein mentioned the plaintiffs were, and now are, corporations existing under the laws of the Dominion of Canada, and were, and now are, engaged, among other things, in the marketing of peat, with principal places of business as hereinafter set forth:

Acme Peat Products, Ltd., 789 West Pender St., Vancouver, B. C.

Alouette Peat Products, Ltd., McTavish Road, Pitt Meadows, B. C.

Atkins & Durbrow, Ltd., Royal Bank Bldg., Vancouver, B. C.

Blundell Peat Co., 806 #6 Road, R.R. #2, Vancouver, B. C.

Byrne Road Peat Farms, 2707 McKay Avenue, Burnaby, B. C.

Coast Peat Co., Ltd., 1115 Vancouver Block, Vancouver, B. C.

Excelsior Peat Co., Ltd., 7675 Osler Avenue, Vancouver, B. C.

Lulu Island Peat Co., Ltd., R.R. #2, Eburne, B. C.

Northern Peat Moss Co., Ltd., No. 8 Rd. R.R. #2, Eburne, B. C.

Pacific Peat Products, Ltd., 1137 West Hastings St., Vancouver, B. C.

Richmond Peat Products, Ltd., 1137 West Hastings St., Vancouver, B. C.

Shafer-Haggart, Ltd., Vancouver, B. C.

Western Peat Co., Ltd., P. O. Box 699, New Westminster, B. C.

V.

That hitherto, to wit, on the 5th day of December, 1946, in proceedings denominated as Ex Parte 162, which is more particularly set forth in 266 I.C.C. 537, the Interstate Commerce Commission did make and enter an order allowing certain increases in freight rates and, in particular, in the Conclusion, Appendix 1—Sheet 1, as follows:

“Basic freight rates, whether class or commodity, and charges, on the commodities hereinafter specified, may be increased in the amounts and in the manner set forth as to each commodity class or group. The commodity group numbers (or commodity class numbers) used in this appendix, and throughout the entire report and order, for convenience, are those specified in the order of Division Four of November 22, 1927, In the Matter of Freight Commodity Statistics, which was in effect at the date of submission herein, although a new list of commodity classes with articles assigned thereto has been promulgated by order of Division One, September 24 and October 16, 1946, to become effective January 1, 1947. They are intended generally to cover the items customarily included by the carriers in their reports to the Commission under each numbered description, as of the date for the submission.”

That the same decision set forth in Appendix 1—Sheet 7 the following allowed increases:

“Fertilizers, n.o.s., Including Potash—Group 640

“Diatomaceous or Infusorial Earth—Group 701

“Twenty percent, subject to a maximum of 6 cents per 100 pounds, or \$1.20 per net ton.”

That Commodity Group No. 640 of the Freight Commodity Statistics, referred to by the Commission, included peat, ground or unground, as a fertilizer. That accordingly, pursuant to said decision, the Interstate Commerce Commission did authorize a 20% increase in freight rates for the shipment of peat, subject, however, to a maximum of 6 cents per 100 lbs., or \$1.20 per ton, and subject to the condition that the authorized increases be given specified publication of such authorized increases which was not done.

VI.

The carriers involved in this case in publishing their rates published a 6 cent maximum increase in rates on peat only when that commodity was carried in tariffs under fertilizer groups. In instances where a special commodity rate was published for peat, the full 20% increase was published and exacted. The rates applying on peat from points in British Columbia to destinations in the United States were special commodity rates. That such 20% increase and such commodity rates were not authorized. That accordingly from January 1, 1947 until January 1, 1948, shipments of peat or peat products originating from points in British Columbia were unlawfully made subject to the full 20% in-

increase. That the publication of the tariffs in this paragraph referred to were improperly made on a 5-day shortened period of publication in violation of Ex Parte 162, which order permitted only authorized increases to be made on said 5-day notice. That on March 29, 1948, the carriers amended their master tariff to show the 6 cent maximum increase authorized on peat. Prior to said time, the carriers unlawfully republished rates on peat originating in British Columbia to points in northern California by taking the full 20% increase.

VII.

That the increase in rates damaged the plaintiffs in this case by causing a loss of market.

VIII.

That the parties plaintiff did file two Complaints before the Interstate Commerce Commission praying for reparations for the overcharges exacted and for a reduction of the rates imposed by the carriers for shipments of peat into northern California. That, acting upon said Complaints, the Interstate Commerce Commission did, on April 7, 1950, make and enter its Findings, Conclusions and Order awarding reparations to the complainants therein, and further ordering the unauthorized increase exacted on shipments of peat to northern California to be removed. That defendant carriers' petition for reconsideration was denied by Order made and entered by the Interstate Commerce Commission on January 7, 1952. That on December 30,

1953, the Interstate Commerce Commission did make and enter its supplemental Order listing the exact amounts to be paid to each plaintiff by each defendant carrier, together with interest thereon. That said defendant carriers were ordered and directed to make said reparation payments to the plaintiffs on or before February, 1954.

IX.

On March 8, 1954, the defendant carriers petitioned the Interstate Commerce Commission for leave to reopen and reconsider, which petition was granted by Order entered the 21st day of June, 1954. That on October 4, 1954, the Interstate Commerce Commission issued its Findings, Conclusions and Order denying relief to the plaintiffs herein, and dismissing their Complaints. That thereafter plaintiffs petitioned for reconsideration of the aforesaid Order of October 4, 1954. That on January 3, 1955, the Interstate Commerce Commission issued its Order denying plaintiffs' petition for reconsideration.

From the foregoing Findings of Fact, the Court makes the following

Conclusions of Law

I.

That it has jurisdiction over the subject matter and parties hereto.

II.

That the action of the defendant carriers in publishing tariffs on shortened notice, not authorized

y Ex Parte 162 referred to in the Findings herein, was illegal and void. That accordingly the defendant carriers were not entitled either to exact the 10% increase or the 6 cent maximum permitted under Ex Parte 162. That the rates which were in effect immediately before the initiation of the proceedings by the defendant railroads for the purpose of obtaining an increase in the rates were the legal rates applicable to these shipments here in question at the time they were made, and that all rates applied to plaintiffs' shipments and all sums of money exacted from plaintiffs by applying such freight rates to the extent of the excess of such rates over said prior existing approved rates are and were illegal and void and without legal right, since said rates were not authorized by law nor promulgated in the manner provided by law nor in the manner specifically and expressly conditioned by the Interstate Commerce Commission.

III.

That where shipments of peat, as herein complained of, have been carried over a route involving more than one carrier, said carriers are jointly and severally liable for the refund of the excess charges thus illegally exacted.

IV.

That the Interstate Commerce Commission violated its own rules and as a result thereof denied the plaintiffs due process by granting a second petition of the railroads for reconsideration as more particularly set forth in its Order of June 21, 1954.

V.

That the plaintiffs are entitled to judgment against the defendants, and each of them directing that the orders heretofore made by the Interstate Commerce Commission be reversed, and that these causes above-captioned be remanded to the Interstate Commerce Commission for the fixing of the amount of reparations due the plaintiffs, together with interest thereon, and the entry of a reparations order consistent with the findings of fact, conclusions of law and judgment herein entered.

Done in Open Court this 19th day of June, 1956.

/s/ JOHN C. BOWEN,

United States District Judge

Presented by:

/s/ ROBERT O. BERESFORD,

Of Wright, Booth & Beresford,

Attorneys for Acme Peat Products,
Ltd., et al., and Alouette Peat
Products, Ltd.

[Endorsed]: Filed June 19, 1956.

In the District Court of the United States, West-
ern District of Washington, Northern Division
Consolidated Actions

No. 3923

ALOUETTE PEAT PRODUCTS, LTD.,
Plaintiff,
vs.

UNITED STATES, et al., Defendants.

No. 3924

ACME PEAT PRODUCTS, LTD., et al.,
Plaintiffs,
vs.

UNITED STATES et al., Defendants.

JUDGMENT

This matter having come on duly and regularly
for trial on the 12th day of June, 1956, before the
undersigned Judge of the above-entitled court; and
said causes above having been consolidated by order
of Court duly made and entered on the 29th day of
July, 1955, pursuant to stipulation between all
parties; and the plaintiffs in both causes being
represented in court by their attorneys, Robert O.
Beresford and JoAnn R. Locke of the firm of
Wright, Booth & Beresford, and Fred H. Tolan;
and the defendant, United States of America, being
represented in court by John A. Roberts, Jr., As-

sistant United States Attorney; and the Intervening Defendant, the Interstate Commerce Commission, being represented in court by John A. Roberts, Jr.; and the intervenor railroads, Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Union Pacific Railroad Company; Southern Pacific Company; Great Northern Railway Company; and Northern Pacific Railway, being represented in court by and through their attorney, R. Paul Tjossem; and the defendant, United States of America, having taken a neutral position in this action, and the intervening defendant, the Interstate Commerce Commission having submitted their case on written briefs, and having, through their attorney, John A. Roberts, Jr., tendered in open court oral argument of the above-captioned actions to the intervenor railroads, acting by and through their attorney, R. Paul Tjossem; and the transcript of all of the proceedings before the Interstate Commerce Commission having been filed in the above-captioned proceedings and having been produced by the plaintiffs, being duly and regularly introduced as exhibits in the above-captioned causes; and no further testimony having been taken or evidence introduced by any party to the action; and the Court having heard oral argument, and being familiar with the records and files herein, and having heretofore announced its oral decision, and the Court having heretofore made and entered its written Findings of Fact and Conclusions of Law, it is now

Ordered, Adjudged and Decreed as follows:

I.

That it has jurisdiction over the subject matter and parties hereto.

II.

That the above-captioned cases be, and they hereby are, remanded to the Interstate Commerce Commission for the purpose of making and entering a reparations order consistent with the Findings of Fact and Conclusions of Law heretofore made by the Court herein.

III.

That the orders made by the Interstate Commerce Commission relating to the above-captioned cases be, and they hereby are, reversed, and these cases be, and they hereby are, remanded to the Interstate Commerce Commission for the purpose of fixing the amount of reparations due the plaintiffs, together with interest thereon, and the entry of a reparations order consistent with the Findings of Fact, Conclusions of Law and Judgment herein entered.

IV.

That plaintiffs be, and they hereby are, awarded judgment against intervening defendants for their taxable costs herein incurred.

Done in Open Court this 19th day of June, 1956.

/s/ JOHN C. BOWEN,

United States District Judge

Presented by:

/s/ ROBERT O. BERESFORD,
Of Wright, Booth & Beresford,
Attorneys for Acme Peat Products,
Ltd., et al., and Alouette Peat
Products, Ltd.

Affidavit of Service attached.

[Endorsed]: Filed June 19, 1956.

[Title of District Court and Causes 3923 and 3924.]

NOTICE OF APPEAL

Notice Is Hereby Given, that the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Union Pacific Railroad Company, Southern Pacific Company, Great Northern Railway Company, and Northern Pacific Railway Company, all corporations and intervening defendants in the above entitled consolidated actions, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in these consolidated actions, dated June 19, 1956.

Dated this 13th day of August, 1956.

/s/ HAROLD G. BOGGS,
/s/ ROBERT F. GARING,
/s/ R. PAUL TJOSSEM,
Attorneys for Appellants

[Endorsed]: Filed August 13, 1956.

[Title of District Court and Causes 3923 and 3924.]

NOTICE OF APPEAL

Notice is hereby given that the Interstate Commerce Commission, one of the intervening defendants in the above-entitled action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment entered in these actions on June 19, 1956.

/s/ ROBERT W. GINNANE,
General Counsel

/s/ C. H. JOHNS,
Asst. General Counsel, Inter-
state Commerce Commission

[Endorsed]: Filed August 18, 1956.

[Title of District Court and Cause No. 3923.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) FRCP and designations of counsel I am transmitting herewith the following original documents in the file dealing with the action as the record on appeal herein to the United States

Court of Appeals for the Ninth Circuit at San Francisco, said papers being identified as follows:

1. Complaint, filed April 15, 1955.
4. Motion of Union Pacific Railroad Company, et al., for Leave to Intervene, filed April 29, 1955.
5. Order Granting Union Pacific Railroad Company, et al., Leave to Intervene, filed April 29, 1955.
7. Answer of Intervening Defendant Railroads, filed June 2, 1955.
8. Answer of the U.S.A., filed June 15, 1955.
9. Intervention and Answer of Interstate Commerce Commission, filed June 16, 1955.
10. Stipulation for Consolidation, filed July 29, 1955.
11. Order Consolidating Actions, filed July 29, 1955.
22. Findings of Fact and Conclusions of Law, filed June 19, 1956.
23. Judgment, filed June 19, 1956.
25. Notice of Appeal of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, et al., filed August 13, 1956.
26. Bond for Costs on Appeal, G. N. Railway Co., et al., filed August 13, 1956.
27. Notice of Appeal by Interstate Commerce Commission, filed August 18, 1956.
28. Praeipe for Record on Appeal, filed August 18, 1956.
29. Supplemental Praeipe for Record on Appeal by Intervening Railroads, filed August 21, 1956.
30. Court Reporter's Transcript of Proceedings (Statement of Facts), filed September 4, 1956.

31. Statement of Points on which Appellant Intervening Railroad Defendants Intend to Rely on Appeal, and Designation of Portions of the Record to be Printed, filed September 10, 1956.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of appellants for preparation of the record on appeal in this action, to-wit: Notice of Appeal by Appellant Railroad Defendants, \$5.00; and Notice of Appeal by Appellant Interstate Commerce Commission, \$5.00; that the fee on behalf of the Railroad appellants has been paid to me, but the fee on behalf of the Interstate Commerce Commission has not been paid.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 12th day of September, 1956.

[Seal] MILLARD P. THOMAS,
 Clerk

/s/ By TRUMAN EGGER,
 Chief Deputy Clerk

[Endorsed]: No. 15276. United States Court of Appeals for the Ninth Circuit. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Union Pacific Railroad Company, Southern Pacific Company, Great Northern Railway Company and Northern Pacific Railway Company, Appellants, vs. Allouette Peat Products, Ltd., Appellee. Interstate Commerce Commission, Appellant, vs. Alouette Peat Products, Ltd., Appellee. Transcript of Record. Appeals from the United States District Court for the Western District of Washington, Northern Division.

Filed: September 14, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

in the District Court of the United States, Western District of Washington, Northern Division

No. 3924

ACME PEAT PRODUCTS, LTD., et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Come now the plaintiffs and allege as follows:

I.

At all times mentioned herein plaintiffs were and now are corporations, existing under the laws of the Dominion of Canada, and were and now are engaged, among other things, in the marketing of peat, and had and have mailing addresses as given below:

Acme Peat Products, Ltd., 789 West Pender St., Vancouver, B. C.

Alouette Peat Products, Ltd., McTavish Road, Pitt Meadows, B. C.

Atkins & Durbrow, Ltd., Royal Bank Building, Vancouver, B. C.

Blundell Peat Co., 806 #6 Road, R.R. #2, Vancouver, B. C.

Byrne Road Peat Farms, 2707 McKay Avenue, Burnaby, B. C.

Coast Peat Co., Ltd., 1115 Vancouver Block, Vancouver, B. C.

Excelsior Peat Co., Ltd., 7675 Osler Avenue, Vancouver, B. C.

Lulu Island Peat Co., Ltd., R.R. #2, Eburne, B. C.

Northern Peat Moss Co., Ltd., No. 8 Rd. R.R. #2, Eburne, B. C.

Pacific Peat Products, Ltd., 1137 West Hastings St., Vancouver, B. C.

Richmond Peat Products, Ltd., 1137 West Hastings St., Vancouver, B. C.

Shafer-Haggart, Ltd., Vancouver, B. C.

Western Peat Co., Ltd., P. O. Box 699, New Westminster, B. C.

Prior to January 8, 1948, plaintiff, Atkins & Durbrow, Ltd. operated under the firm name of B. C. Peat Co., Ltd. On January 8, 1948, the firm name was officially changed to Atkins and Durbrow, Ltd., this being a change in name only and not an exchange of assets.

II.

That this action is brought under the laws of the United States of America Regulating Commerce, and particularly the Interstate Commerce Act, 49 U.S.C.A. Section 1 et seq. and 28 U.S.C.A. Section 1336. That this action is brought for the purpose of having this Court review the decision and Orders of the Interstate Commerce Commission set forth in Paragraph V below, and to set the said decisions and Orders aside.

III.

These proceedings originated in a Complaint filed by the above named plaintiffs with the Interstate

Commerce Commission on April 30, 1948, under C.C.C. Docket No. 29974. That the said Complaint was filed against the following named common carriers:

The Akron, Canton and Youngstown Railway Company,

The Alton Railroad Company,

The Alton Railroad Company (Henry A. Gardner, Trustee),

The Atchison, Topeka and Santa Fe Railway Company,

Atlantic Coast Line Railroad Company,

The Baltimore & Ohio Railroad Company,

Bellefonte Central Railroad Company,

The Belt Railroad Company of Chicago,

Boston & Maine Railroad,

British Columbia Electric Railway Company, Limited,

Burlington-Rock Island Railroad Company,

Camas Prairie Railroad Company,

Canadian National Railways,

Canadian Pacific Railway Company,

The Central Railroad Company of New Jersey (Walter P. Gardner, Trustee),

The Chesapeake and Ohio Railway Company,

Chicago, Burlington and Quincy Railroad Company,

Chicago, Great Western Railway Company,

Chicago, Indianapolis and Louisville Railway Company,

Chicago, Milwaukee, St. Paul and Pacific Railroad Company,

Chicago North Shore and Milwaukee Railway Company,

Chicago and North Western Railway Company,
Chicago, Rock Island and Pacific Railway Company,

Chicago, Rock Island and Pacific Railway Company (Joseph B. Fleming and Aaron Colnon, Trustees),

Chicago, St. Paul, Minneapolis and Omaha Railway Company,

Chicago, South Shore and South Bend Railroad Company,

The Colorado and Southern Railway Company,
The Colorado and Wyoming Railway Company,
The Delaware, Lackawanna and Western Railroad Company,

The Denver and Rio Grande Western Railroad Company,

The Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, Trustees),

Duluth, Winnipeg and Pacific Railway Company,
Elgin, Joliet and Eastern Railway Company,

Erie Railroad Company,

Fort Worth and Denver City Railway Company,
Grand Trunk Western Railroad Company,

Great Northern Railway Company,

Green Bay and Western Railroad Company,

Gulf, Colorado and Santa Fe Railway Company,

Illinois Central Railroad Company,

Indiana Harbor Belt Railroad Company,

The Kansas City Southern Railway Company,

Kewaunee, Green Bay and Western Railroad Company,
Lehigh Valley Railroad Company,
The Long Island Railroad Company,
Louisiana & Arkansas Railway Company,
Louisville and Nashville Railroad Company,
Midland Continental Railroad,
The Minneapolis & St. Louis Railway Company,
Minneapolis, Northfield and Southern Railway,
Minneapolis, St. Paul and Saulte Ste. Marie Railroad Company,
Minnesota Western Railway Company,
Missouri-Kansas-Texas Railroad Company,
Missouri-Kansas-Texas Railroad Company of Texas,
Missouri Pacific Railroad Company (Guy A. Thompson, Trustee),
The Nashville, Chattanooga & St. Louis Railway,
The New York and Long Branch Railroad Company,
The New York Central Railroad Company,
The New York, Chicago and St. Louis Railroad Company,
The New York, New Haven and Hartford Railroad Company,
The New York, New Haven and Hartford Railroad Company (Howard S. Palmer, James Lee Loomis, Henry B. Sawyer, Trustees),
Norfolk and Western Railway Company,
Northern Pacific Railway Company,
Northwestern Pacific Railroad Company,
Oregon Trunk Railway,

Pacific Electric Railway Company,
 The Pennsylvania Railroad Company,
 Pere Marquette Railway Company,
 Petaluma and Santa Rosa Railroad Company,
 The Pittsburgh and West Virginia Railway Com-
 pany,
 Reading Company,
 Sacramento Northern Railway,
 The St. Louis, Brownsville and Mexico Railway
 Company (Guy A. Thompson, Trustee),
 St. Louis-San Francisco Railway Company,
 St. Louis, Southwestern Railway Company (Ber-
 ryman Henwood, Trustee),
 St. Louis Southwestern Railway Company of
 Texas,
 St. Louis Southwestern Railway Company of
 Texas (Berryman Henwood, Trustee),
 San Diego and Arizona Eastern Railway Com-
 pany,
 Seaboard Air Line Railroad Company,
 Southern Pacific Company,
 Southern Railway Company,
 Spokane International Railroad Company,
 Spokane, Portland and Seattle Railway Company,
 The Texas Mexican Railway Company,
 Texas and New Orleans Railroad Company,
 The Texas and Pacific Railway Company,
 Tidewater Southern Railway Company,
 The Toronto, Hamilton and Buffalo Railway
 Company,
 Union Pacific Railroad Company,
 Wabash Railroad Company,

Western Maryland Railway Company,
The Western Pacific Railroad Company,
The Wheeling and Lake Erie Railway Company,
The Yazoo and Mississippi Valley Railroad Company.

That the said Complaint, being I.C.C. Docket No. 29974, charged the defendants therein with assessing rates in violation of Sections 1, 3, and 6 of the Interstate Commerce Act, as amended. That the said Complaint prayed that the defendant carriers be ordered to refund overcharges to the complainants and that rates in violation of the Interstate Commerce Commission Order in Ex Parte 162 be reissued and republished so as to comply with the said I.C.C. Order in Ex Parte 162. Plaintiffs allege that the defendant carriers have, since the filing of the said Complaint, complied with Ex Parte 162 rates; and that there is no present violation of the Act, by these defendant carriers, within the scope of the said Complaint filed before the Interstate Commerce Commission. Plaintiffs allege that no review is being sought in regard to, or relief asked as to present rates charged by the aforesaid railroads in this proceeding.

IV.

That the Interstate Commerce Commission set the said Complaint of plaintiffs' above named for hearing, and gave notice of said hearing, and said hearing was commenced at the City of Seattle, Washington, on the 10th day of November, 1948, before George J. Hall, one of the examiners of the said Interstate Commerce Commission. That plain-

tiffs appeared at said hearing by their attorney. That witnesses were sworn and evidence taken and exhibits admitted at the said hearing, and the said hearing was concluded on November 10, 1948. That, thereafter, briefs were filed by complainants and defendants, and, thereafter, a proposed report was issued by examiners George J. Hall, and L. H. Dishman of the Interstate Commerce Commission. That the said proposed report found that complainants' Complaint before the Interstate Commerce Commission should be dismissed. That, thereafter, complainants filed Exceptions to the proposed report, and defendants filed their Reply to exceptions of Complainants. That oral argument was had before the Interstate Commerce Commission at Washington, D. C. on November 17, 1949.

That on the 7th day of April, 1950, the Interstate Commerce Commission entered its Findings and Conclusions and Order, said Order awarding reparation to complainants, and ordering unauthorized increases removed, and granting relief to complainants as prayed for in their Complaint filed with the Interstate Commerce Commission. That a true copy of the said Findings & Conclusions and Order of April 7, 1950 is attached hereto as Exhibit A and is hereby made a part hereof as if set forth at length herein.

That, thereafter, and in accordance with the Rules of the Interstate Commerce Commission, defendants filed their Petition for Reconsideration by the Entire Commission and for Argument, and complainants filed their Reply thereto. That on the

7th day of January, 1952, the Interstate Commerce Commission issued its decision and Order denying defendants' Petition for Reconsideration by the Entire Commission and for Oral Argument. That a true copy of the said Order of January 7, 1952, is attached hereto as Exhibit B and is hereby made a part hereof as if set forth at length herein.

That, thereafter, and on the 30th day of December, 1953, the Interstate Commerce Commission issued its Supplemental Order ordering defendant carriers listed in said Order to pay unto the complainants, on or before February 19, 1954, the amounts set opposite their respective names in the aforesaid Order of December 30, 1953. That a true copy of the said Order of December 30, 1953, is attached hereto as Exhibit C and is hereby made a part hereof as if set forth at length herein. That four of the said defendants partially complied with the said Order of December 30, 1953, by paying reparations to the plaintiffs herein.

V.

That, thereafter, defendants in I.C.C. Docket No. 29974 filed with the Interstate Commerce Commission a Petition for Leave to File Petition to Reopen and Reconsider, and their Petition to Reopen For Reconsideration, said Petitions being dated March 2, 1954. That complainants filed their Reply to both of defendants' said Petitions. That on June 21, 1954, the Interstate Commerce Commission issued its Order granting the defendants' Petition For Leave to File, and the Commission reopened the

said proceedings for reconsideration. That a true copy of the said Order of June 21, 1954 is attached hereto as Exhibit D and is hereby made a part hereof as if set forth at length herein. That complainants' request for oral argument upon defendants' Petition to Reopen For Reconsideration was denied. That on October 4, 1954, the Interstate Commerce Commission issued its Findings and Conclusions and Order denying relief to complainants and dismissing complainants' Complaint. That a true copy of said Findings and Conclusions and Order of October 4, 1954 is attached hereto as Exhibit E and is hereby made a part hereof as if set forth at length herein. That, thereafter, complainants filed their Petition For Reconsideration of the Commission's decision dated October 4, 1954, and the defendants replied to the said Petition. That on January 3, 1955, the Interstate Commerce Commission issued its Order denying plaintiffs' Petition For Reconsideration. That a true copy of said Order of January 3, 1955, is attached hereto as Exhibit F and is hereby made a part hereof as if set forth at length herein.

VI.

That the Interstate Commerce Commission erred in making and entering its Order of June 21, 1954, granting defendants' Petition For Leave to File Petition to Reopen and Reconsider, and the Interstate Commerce Commission erred in reopening the said proceedings and in entertaining the defendants' Petition to Reopen For Reconsideration. That the Commission was without authority of law and

was without jurisdiction in entering the Order of June 21, 1954, as follows:

1. That the said Commission had no authority to reconsider its final Order;
2. That the reconsideration was contrary to the established rules of procedure of the said Commission;
3. That some or all of defendant carriers were in default at the time the said Order of June 21, 1954 was granted;
4. That the Final Order of the Commission dated April 7, 1950, had been partially complied with by defendant carriers at the time of the granting of the Order of June 21, 1954;
5. That the reconsideration by the Commission denied to plaintiffs due process of the law.

VII.

That the Findings and Conclusions and Order entered by the Interstate Commerce Commission on October 4, 1954, and the Order of January 3, 1955, denying a reconsideration to plaintiffs, were and are, and each of them is unlawful and based on a misapplication of law and were and are otherwise arbitrary, capricious, and without support in and contrary to the law and the evidence, and that the Conclusions in the Order of October 4, 1954, were and are not supported by the Findings, and that the Findings in the said Order of October 4, 1954 were and are not supported by any substantial evidence whatsoever. Plaintiff more specifically shows for grounds of review as follows:

1. There is no evidence, or no substantial evidence, in the record to support the Finding of Fact of the Commission as set forth on Sheet 6, last full paragraph, and paragraph on bottom of Sheet 6 and top of Sheet 7 that there is no evidence of unreasonableness in the assailed rates. That the Commission erred in failing to find that the assailed rates were unreasonable.

2. There is no evidence, or no substantial evidence, in the record to support the Finding of Fact of the Commission as set forth on Sheet 2, last paragraph, and in the paragraph on the bottom of Sheet 6, and the top of Sheet 7 that there is no showing of undue prejudice. That the Commission erred in failing to find that the actions of the defendant carriers, in publishing rates contravening an Order of the Commission and/or publication of said rates on short notice without authority created undue prejudice to the complainants.

3. That the conclusion of the Commission, as set forth on Sheet 2, first full paragraph, and paragraph at the bottom of Sheet 6, and the top of Sheet 7 that the assailed rates are applicable is contrary to law and the whole of the evidence.

4. That the conclusion of the Commission, as set forth on Sheet 3, first full paragraph, that improper tariff publication does not give rise to unreasonableness is contrary to law and the whole of the evidence, and denies to these plaintiffs due process of the law.

5. That the conclusion of the Commission as set forth on Sheet 3, first full paragraph, and Sheet 2,

first full paragraph, that reparations are not allowable for improper tariff publication, is contrary to law and the whole of the evidence, and denies plaintiffs herein the due process of law.

6. The Commission erred in failing to find that publication of rates by defendant carriers, without proper statutory notice, makes the rates inapplicable to plaintiffs.

7. The Commission erred in concluding as a matter of law that complainants' Complaint be dismissed upon the ground that the Commission made no finding that the assailed rates were reasonable and the said Order of October 4, 1954, is not supported by any Finding of Fact that the rates assailed were reasonable.

8. That the Commission erred in failing to give due and proper consideration to the Findings and Conclusions and Final Order entered by the Commission on April 7, 1950, and erred in reversing said Findings and Conclusions and Order of April 7, 1950, in that the said Findings, Conclusions and Order of April 7, 1950, were each and all supported by substantial evidence and in accordance with the law.

9. That the Commission erred in entering its Order of October 4, 1954, and the whole thereof herein, upon the ground that said Order, and the whole thereof, is unsupported by Conclusions of Law, and Findings of Fact supported by substantial evidence upon the record considered as a whole, and is contrary to law.

Wherefore, plaintiffs pray this Honorable Court as follows:

1. That this Court take jurisdiction of the proceedings, and of the questions determined therein, and that this Court review all of the said records and proceedings had by the Interstate Commerce Commission in this matter; that the Court make and enter its Order and Decree that the said Orders of June 21, 1954, October 4, 1954, and January 3, 1955, made by the said Interstate Commerce Commission, be annulled, vacated, and set aside; that this Court make and enter its Decision and Order awarding reparation to plaintiffs of all sums charged by the common carriers listed in Paragraph III herein, in excess of the rates legally chargeable by said carriers, and make and enter herein Findings of Fact, and Conclusions of Law, and Decision consistent and in accordance with the evidence and the law in this cause; that the Court further make such decision and Order as shall be appropriate in the premises.

2. That this Court make and enter its Order directed to the Interstate Commerce Commission requiring the said Interstate Commerce Commission to certify fully to this Honorable Court, at a specified time and place, all of the records and proceedings of the said Interstate Commerce Commission in the said ICC Docket No. 29974, including all Orders and decisions therein, the transcript of all testimony, together with all the exhibits or copies thereof introduced, and the written briefs filed by the parties herein, and the transcript of

oral argument had before the said Commission, and the pleadings, and all files, filings, correspondence, records and proceedings in the said cause, to the end that they may be made a part of the record before this Court, so that this Court may review the lawfulness of the said acts of the Commission.

3. Plaintiffs further pray for their costs and disbursements herein.

WRIGHT, BOOTH & BERESFORD

/s/ ROBERT O. BERESFORD and

/s/ JOANN R. LOCKE

Attorneys for plaintiffs

[Endorsed]: Filed April 15, 1955.

[Title of District Court and Cause No. 3924.]

MOTION FOR LEAVE TO INTERVENE

Come Now the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Union Pacific Railroad Company, Southern Pacific Company, Great Northern Railway Company and Northern Pacific Railway Company, and pursuant to Title 28, Section 2323, petition the Court for an order granting leave to the above named petitioners to intervene herein as defendants, and in support thereof show the Court as follows:

I.

That each of the above named petitioners operates a line of railroad as a common carrier in interstate commerce and as such are subject to regula-

tion by the Interstate Commerce Commission under Part I of the Interstate Commerce Act.

II.

That each of the above named petitioners were parties defendant in the cause No. 29974 entitled Acme Peat Products, Ltd., et al, vs. The Akron, Canton and Youngstown Railway Company, et al., lately pending before the Interstate Commerce Commission.

III.

That the purpose of this action is to have this Court annul, vacate and set aside the final order of the Interstate Commerce Commission entered in said Cause No. 29974 dismissing plaintiffs' complaint against your petitioners, and therefore your petitioners have a direct and substantial interest in this proceeding.

/s/ HAROLD G. BOGGS

/s/ ROBERT F. GARING

/s/ R. PAUL TJOSSEM

Attorneys for Petitioners

Acknowledgment of Service Attached.

[Endorsed]: Filed April 29, 1955.

[Title of District Court and Cause No. 3924.]

ORDER GRANTING LEAVE TO INTERVENE

This Cause coming on to be heard on the 29th day of April, 1955 on the petition of Chicago, Milwaukee, St. Paul and Pacific Railroad Company,

Union Pacific Railroad Company, Southern Pacific Company, Great Northern Railway Company and Northern Pacific Railway Company, for leave to intervene in the above entitled suit and to be made party defendants thereto, and the petition having been duly considered, and it appearing to the Court that the above named petitioners have an interest in the above entitled suit sufficient to warrant each of them becoming a party to this suit, It Is Therefore,

Ordered, Adjudged and Decreed that the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Union Pacific Railroad Company, Southern Pacific Company, Great Northern Railway Company and Northern Pacific Railway Company be, and each of them hereby is granted leave to intervene in said suit as a party defendant.

Done in open Court this 29th day of April, 1955.

/s/ JOHN C. BOWEN

United States District Judge

Presented by:

/s/ R. PAUL TJOSSEM

Of Attorneys for Petitioners.

Acknowledgment of Service Attached.

[Endorsed]: Filed April 29, 1955.

In The District Court of The United States, Western District of Washington, Northern Division

No. 3924

ACME PEAT PRODUCTS, LTD., et al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant,

and

CHICAGO, MILWAUKEE, ST. PAUL, AND
PACIFIC RAILROAD COMPANY, et al.,
Intervening Defendants.

ANSWER OF INTERVENING DEFENDANT
RAILROADS

Come Now the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Union Pacific Railroad Company, Southern Pacific Company, Great Northern Railway Company and Northern Pacific Railway Company, intervening defendants, and answer the complaint of the plaintiffs herein as follows:

I.

Admit the allegations in paragraphs I and II of said complaint.

II.

Admit the allegations of paragraph III of said complaint, and allege that these defendants in pub-

lishing and charging the rates therein described did not and have not violated any provision of the Interstate Commerce Act, 49 U.S.C.A. Sections 1, 3, and 6, as amended, or any order of the Interstate Commerce Commission entered pursuant thereto.

III.

Admit the allegations of paragraph IV of said complaint except the allegation "That four of the said defendants partially complied with the said order of December 30, 1953, by paying reparations to the plaintiffs herein," as to which allegation these defendants, for lack of information, neither admit nor deny, and allege that none of defendant parties to this answer have paid reparations pursuant to said order.

IV.

Admit the allegations in paragraph V of plaintiffs' complaint.

V.

Deny each and every allegation contained in paragraphs VI and VII of plaintiffs' complaint.

Wherefore, having fully answered the complaint of the plaintiffs herein, these intervening defendants pray that judgment be entered affirming the orders of the Commission entered in said cause, I.C.C. Docket 29974, dated October 4, 1954 and January 3, 1955; that the plaintiffs take nothing by their complaint in this cause; that the same be dismissed; and that these intervening defendants be awarded their costs and disbursements incurred in

defending this cause; and that the Court grant such other and further relief as in the premises appears equitable and just.

/s/ HAROLD G. BOGGS

/s/ ROBERT F. GARING

/s/ R. PAUL TJOSSEM

Attorneys for Intervening
Defendant Railroads

Acknowledgment of Service Attached.

[Endorsed]: Filed June 2, 1955.

[Title of District Court and Cause No. 3924.]

ANSWER OF THE UNITED STATES OF
AMERICA

Now comes the United States of America, as defendant herein, and in answer to the Complaint says:

I.

This is a Complaint seeking to set aside an order of the Interstate Commerce Commission. The Interstate Commerce Act contains provisions adequate for the protection of the Commission's orders at the hands of the Commission and of the railroads, when as here, they are the real parties in interest [28 U.S.C.A. Sec. 2323].

II.

The Commission's order challenged herein involves the same parties, the same disputes, and the same claims for money damages as were involved in

the proceedings before the Commission. The interested governmental agency, i.e., the Interstate Commerce Commission, will avail itself of the statutory authorization to interpose all defenses to the shipper's charges and claims possible of being interposed. Thus the Commission, and the railroads, if they so elect, will have an opportunity to present their respective positions through their own counsel. Under these circumstances, and in view of these facts, the United States does not oppose the Commission's order, but does not participate in its defense.

III.

Accordingly, the United States neither admits nor denies any of the allegations of the Complaint.

/s/ JAMES E. KILDAY

/s/ JOHN H. D. WIGGER

Special Assistants to the
Attorney General

STANLEY N. BARNES

Assistant Attorney General

CHARLES P. MORIARTY

United States Attorney

/s/ By F. N. CUSHMAN

Assistant U. S. Attorney

Attorneys for the United States
of America

Certificate of Service Attached.

[Endorsed]: Filed June 15, 1955.

[Title of District Court and Cause No. 3924.]

INTERVENTION AND ANSWER OF INTER- STATE COMMERCE COMMISSION

Comes now the Interstate Commerce Commission and pursuant to the provisions of U.S. Code, Section 2323 (28 U.S.C. 2323), hereby intervenes as of right as a party defendant in the above-entitled cause, enters the appearance of its counsel therein, and for answer to plaintiffs' complaint, says:

First Defense

This Court lacks venue to entertain this suit because Title 28 U.S. Code, Section 1398, specifically provides that "any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action", and nowhere in the complaint is it alleged that plaintiffs or any of them have their residences or principal offices within the judicial district in which this suit is brought. On the contrary it is alleged in the first paragraph of the complaint herein that plaintiffs are Canadian corporations engaged in the marketing of peat, with addresses in the cities and towns in British Columbia, Canada, referred to in paragraph I of said complaint; therefore, plaintiffs are without standing to maintain this suit.

Second Defense

Without waiving its foregoing defense, and fur-

her answering the plaintiffs' complaint herein, the Commission answers and says:

I.

Answering the allegations of paragraphs I, II and III of the plaintiffs' complaint, the Commission admits the same, except that as to the allegation contained in the last unnumbered paragraph of paragraph III, the Commission denies any implication that the rates charged on plaintiffs' shipments were unlawful.

II.

Answering the allegations of paragraph IV of the plaintiffs' complaint, the Commission admits that hearings were held before its examiner as alleged and that a proposed report was issued containing a recommendation that plaintiffs' complaint should be dismissed. It is also admitted that following the filing of exceptions to the proposed report and replies to exceptions that oral argument was had before the Commission as alleged. It is further admitted that on April 7, 1950, Division 2 of the Commission served its report and order finding that the assailed rates were applicable, but were unjust and unreasonable and concluded that plaintiffs were entitled to an award of reparations based upon the findings contained in its said report (277 I.C.C. 641), to which the Court is referred for a full, true and accurate statement of such findings and conclusions. The remaining allegations of said paragraph are admitted.

III.

Answering the allegations of paragraph V of plaintiffs' complaint herein, the Commission admits the same.

IV.

Answering the allegations of paragraph VI of plaintiffs' complaint herein, the Commission denies that it erred in making and entering its order of June 21, 1954, or that it acted beyond the scope of its authority and jurisdiction for any of the reasons alleged in said paragraph or for any other reason or reasons.

V.

Answering the allegations of paragraph VII of plaintiffs' complaint, the Commission denies that the orders referred to therein are unlawful and are based on misapplication of law and are arbitrary and capricious and without support in the law, and denies that its said order of October 4, 1954, is not supported by adequate findings and conclusions and substantial evidence and further denies that its said order is invalid for any of the reasons stated in said paragraph or for any other reason or reasons.

Answering paragraph 2 of plaintiffs' prayer (complaint pages 10-11), the Commission avers that there is no statutory requirement that the Court issue an order directing the Commission to prepare and certify the records and proceedings had before it in Docket I.C.C. No. 29974, as part of the record to be presented to this Court for review of the actions of the Commission in this cause. In this connection the Commission avers that it is the duty and

obligation of plaintiffs to obtain the record from the Commission (Wilson v. United States, 114 F. Supp. 814, 821; Mississippi Valley Barge Co. v. United States, 292 U.S. 282, 286-287) for introduction in Court, and the Commission also avers that upon request of plaintiffs and the payment by them of a nominal fee to cover the cost of preparation, a certified copy of the record may be obtained from the Secretary of the Commission for that purpose. (Section 1006(d), Title 5 U.S.C.)

Except as herein expressly admitted the Commission denies the truth of each of and all the allegations contained in the complaint, insofar as they conflict with the allegations herein.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct and hereby prays that said complaint be dismissed.

INTERSTATE COMMERCE
COMMISSION,

/s/ By SAMUEL R. HOWELL,
Associate General Counsel

Certificate of Service Attached.

[Endorsed]: Filed June 16, 1955.

[Title of District Court and Cause No. 3924.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States

District Court for the Western District of Washington do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) FRCP and designations of counsel I am transmitting herewith the following original documents and papers in the file dealing with the action as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers being identified as follows:

1. Complaint, filed Apr. 15, 1955.
4. Motion Chicago, Milwaukee, St. Paul and Pacific Railroad Company et al. to intervene, filed Apr. 29, 1955.
5. Order Granting Leave to Intervene, filed Apr. 29, 1955.
7. Answer of Intervening Defendant Railroads, filed June 2, 1955.
8. Answer of United States of America, filed June 15, 1955.
9. Intervention and Answer of Interstate Commerce Commission, filed June 16, 1955.
10. Copy of Notice of Appeal of Appellant Railroads, filed 8/13/56.
11. Copy of Bond for Costs on Appeal, filed 8/13/56.
12. Copy of Notice of Appeal of ICC, filed 8/18/56.
13. Copy of Praecipe for Record on Appeal of I.C.C., filed 8/18/56.
14. Copy of Supplemental Praecipe for Record on Appeal (Railroads), filed Aug. 21, 1956.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 12th day of September, 1956.

[Seal] MILLARD P. THOMAS,
 Clerk,

/s/ By TRUMAN EGGER,
 Chief Deputy Clerk

[Endorsed]: No. 15277. United States Court of Appeals for the Ninth Circuit. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Union Pacific Railroad Company, Southern Pacific Company, Great Northern Railway Company and Northern Pacific Railway Company, Appellants, vs. Acme Peat Products, Ltd., et al., Appellees. Interstate Commerce Commission, Appellant, vs. Acme Peat Products, Ltd., et al., Appellees. Transcript of Record. Appeals from the United States District Court for the Western District of Washington, Northern Division.

Filed: September 14, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of District Court and Causes Nos. 3923 and 3924.]

STATEMENT OF FACTS

Be It Remembered that the above entitled and numbered causes were consolidated for hearing and

heard before the Honorable John C. Bowen, a Judge of the above entitled Court, beginning Tuesday, June 12, 1956, at 10:00 o'clock a.m.

The plaintiffs were represented by Mr. Robert O. Beresford and Miss JoAnn R. Locke, of Messrs. Wright, Booth & Beresford, Attorneys at Law.

The defendant was represented by Mr. John A. Roberts, Jr., Assistant United States Attorney.

The interveners were represented by Mr. R. Paul Tjossem, Attorney at Law.

Whereupon, the following proceedings were had and done, to-wit: [2]*

The Court: In Case No. 3923, entitled *Alouette Peat Products, Ltd., vs. the United States of America and others*, and also in Case No. 3924, entitled *Acme Peat Products, Ltd., and others, vs. United States of America, et al.*, those cases having been previously consolidated for trial, I ask are each of the parties and their Counsel ready to proceed with the trial of those two cases?

Mr. Tjossem: The intervening defendants are ready, your Honor.

Miss Locke: The plaintiffs are ready, your Honor.

Mr. Roberts: The defendant United States of America is present, your Honor, and has tendered the defense to the Interstate Commerce Commission, whom I also represent in this court.

The Court: Any other parties represented by separate Counsel? (No response.) How long do

* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

plaintiffs' Counsel estimate, Mr. Beresford, that these two cases together will take to try?

Mr. Beresford: Your Honor, this being an appeal on the record alone, I would certainly think that the cases could readily be concluded today. It is primarily a matter of argument. In fact, it is entirely a matter of argument. Of course, we have [3] filed our brief and I believe the Interstate Commerce Commission filed their brief last week. To some extent the argument will be circumscribed if the Court has had the opportunity to read those briefs——

The Court: I will say this: The Court has been reading the record, but the Court will require Counsel for each litigant to point out in writing every statement in every printed or mimeographed or photographed record, every statement which Counsel for the party concerned believes has anything to do with the factual or legal situation involved in these two cases, and I want you to make a written list of it so that there will be no doubt about the Court's having called to its attention specifically the very statement in the record, the specific and identical statement in this record, especially this record that comes from the Interstate Commerce Commission. I emphasize that in particular because it is a voluminous, burdensome record and one, no matter how careful in trying to read it and digest it, might overlook a statement which would be a very material statement, and I do not wish to do that.

Mr. Beresford: Yes, your Honor.

The Court: So, having that suggestion in mind,

I ask you how long you think it will take to try [4] these two cases. The Court will not accept submission of the cases for trial until that is done.

Mr. Beresford: I still think it can be done in one day, your Honor.

The Court: Very well. What, Mr. Tjossem, do you think will be the time needed to try these cases?

Mr. Tjossem: It is my understanding that the Interstate Commerce Commission has requested and received permission to submit their argument on brief, and I have been asked if I would handle some of their points in oral argument, so that I will have to not only cover the intervening defendant railroads' position but some of the Interstate Commerce Commission position. I might say, your Honor, that our positions are substantially identical. However, I think that if we are going into a full argument that this case should take the full day and part of tomorrow.

The Court: Mr. Roberts, have you any opinion different or in addition to what has been stated?

Mr. Roberts: I have not, your Honor. I concur completely in Mr. Tjossem's remarks.

The Court: Do the statements made represent all the litigants?

Mr. Roberts: They do, your Honor.

Mr. Beresford: Yes, your Honor. [5]

The Court: I wish now to proceed with the trial of the Peat cases which are consolidated for trial. I cannot tell how much of the trial of the Peat cases will be strictly argument and comments by Counsel on the record as distinguished from efforts by Coun-

sel to make a record of fact. I cannot tell that in advance, but it would be a great convenience to the reporter if he knew by an indication from Counsel when they feel certain that the trial is finished and the argument begun what their attitude is about having the reporter present to report argument. From what I gather from the statements of Counsel I suspect that a large percentage, perhaps by far the greater portion of your time will be taken up in argument rather than in the introduction of evidence in the trial. Have you any desire that your arguments be reported, Mr. Beresford?

Mr. Beresford: Your Honor, as far as the plaintiff is concerned there will be no attempt to introduce any evidence. We regard this primarily—as entirely a matter of argument. It's an appeal, and my recollection is we can't introduce evidence at this stage of the proceedings. The evidence has all been disposed of and introduced, rather, before the administrative board; in answer to the first query [6] raised by the Court. In answer to the second, I see no reason why the oral argument should be transcribed. It is certainly——

The Court: It is rather expensive to have it transcribed and I guess the opposing side at least thinks it is not worth the cost. Maybe the one making the argument sometimes might think it would be, but the opposing side usually feels that is true. What is the attitude of other Counsel about reporting arguments?

Mr. Tjossem: If the Court please, if it would be of any assistance to the Court, why we would be

glad to contribute to the cost of having the argument transcribed, and make that offer.

The Court: You should make arrangements with the reporter first about it. Is there any——

Mr. Tjossem: We have no particular reason to have the argument transcribed.

The Court: Does the United States wish to go to the expense of transcribing the argument?

Mr. Roberts: No, your Honor, I have no request one way or another on that. I will leave it to other Counsel.

The Court: Does Mr. Tjossem and does Mr. Roberts share the suggestion of Mr. Beresford that there is not to be offered any factual data in addition [7] to that which is already properly before the Court? Is there anything else in the way of facts to be added to what you already have properly before the Court at this time in the way of facts?

Mr. Tjossem: If the Court please, we have no evidence, but it is our position and the position of the Interstate Commerce Commission that there is nothing now before this Court.

The Court: Don't you see what I am after, Mr. Tjossem? I want to know whether this reporter ought to be here to get into the record some more facts which are not already there.

Mr. Tjossem: Well, that's what I'm trying to answer, your Honor. As I understand, what has happened in this proceeding is that the plaintiffs have obtained a record from the Interstate Commerce Commission which your Honor permitted them to file with the clerk of this court. The statute under

which this case is being tried permits the record of the Interstate Commerce Commission to be introduced as evidence in this case and thereupon the case shall proceed as in any other civil cause.

Now, the mere filing of this transcript with the clerk, it is our position, does not bring that record before your Honor in this case. [8]

The Court: At this time it is proper for the plaintiffs to make an opening statement of what plaintiffs think the proof will be in this case, and I will hear you from your present stations in making that opening statement.

Mr. Beresford: Your Honor.

The Court: Mr. Beresford.

Mr. Beresford: I think I correctly understand the Court. In this situation it will not be necessary to make an opening statement as to what the evidence will be, since there will be no evidence introduced on the part of the plaintiff.

The Court: Then you may waive that. At this time or later on at some proper stage of the trial defendants and all others opposed to the plaintiffs' case may make an opening statement of what they think the proof will be if they feel that is worth their time and effort. If they do not feel so, it is appropriate for them to waive opening statement. Does the United States of America wish to make an opening statement at this time?

Mr. Roberts: No, your Honor, not at this time, and at further proceedings before this Court the United States will relinquish its time, so to speak, to the intervener railroads. [9]

The Court: Does the Interstate Commerce Commission, the intervening defendant in Cause No. 3924, wish at this time to make an opening statement?

Mr. Roberts: The Interstate Commerce Commission, if your Honor please, will also relinquish its time as to the making of an opening statement and waive its right to do so, passing to the intervenor railroads the position of representing not only the railroads but the position of the Commission in this hearing.

The Court: If there is any railroad or any other litigant who has filed an appearance in either one of these cases, I ask you, that litigant, through its Counsel, if that litigant or any one of the railroad litigants wish now to make an opening statement. If so, the Court will hear you. Does any railroad wish to? Hearing no reply, you may proceed with the trial of the case, and I would like to know now who it is who is appearing. I see that the answer of the intervening railroads was filed June 2, 1955, in Cause No. 3923, and those railroads appear to be the following: Union Pacific Railroad Company, a corporation; Southern Pacific Company, a corporation; Great Northern Railway Company, a corporation, and Northern Pacific Railway Company, a corporation as intervening defendants, and [10] in particular does any one of those intervening defendants wish to make an opening statement at this time?

Mr. Tjossem: If the Court please, I am here rep-

representing all of the appearing railroad intervening defendants, and when I speak——

The Court: Did I succeed in naming all of those who have so appeared?

Mr. Tjossem: Yes. All of the railroads who are appearing in this case as interveners are parties to the answer and you have read all of them, and I am appearing here in behalf of all of those parties.

If the Court please, I would still like to make my record here if I could. In light of the statement——

The Court: At this point, unless there is some reason why you do not wish to do so, it would be appropriate for you to advise the Court whether any one of those defendants wishes to have their Counsel make at this time an opening statement of what they think the proof will be.

Mr. Tjossem: No, all of the appearing railroad defendants waive their right to make an opening statement and would like to reserve that to a later time. [11]

The Court: That is approved by the Court. Now if you feel there is something important that you should say now before the plaintiffs begin their case in chief, you may do that, Mr. Tjossem.

Mr. Tjossem: Yes. I would like at this time on behalf of the Interstate Commerce Commission and the appearing intervening railroad defendants to move and do move to dismiss this cause for the reason that there is no evidence in this record on which the Court may proceed and that the cause should be dismissed for failure of proof.

The Court: The motion is denied. Now the plaintiffs may now proceed with their case in chief.

Mr. Beresford: Your Honor, we have filed a transcript of proceedings.

The Court: What date was that filed, Mr. Beresford? For the record, Mr. Tjossem, may I ask, is it your understanding that the answer of the intervening defendant railroads was joined in by each and all of those railroads whose names I a moment ago called out?

Mr. Tjossem: Yes, that's correct, your Honor.

The Court: I believe there is one additional, the Chicago, Milwaukee, St. Paul and——

Mr. Tjossem: Yes. I thought you read that. [12]

The Court: I don't remember seeing that. Counsel should see to it that the record is here. I understand it is not here and we have to wait now until the clerk sends down to see if he can find it. You ought to see that the record is here.

Mr. Tjossem, in the answer I referred to a few moments ago, the first one that I mentioned, that one filed in Cause No. 3923 on June 2nd, did not in the caption have the name of the Milwaukee.

Mr. Beresford, I think you had better go to the clerk's office and see that there is obtained what you want the Court to look at in this case and consider. Be sure to expedite your mission and to return as soon as possible.

(Brief pause.)

The Court: All are present again. Referring to the identity of the intervening defendants, do they wish the Court to understand that there have ap-

appeared in the case the following, and I am now referring to Cause No. 3923, the following such intervening defendants: The ones that I have already mentioned in that case and in addition thereto the railroad company whose corporate name is sometimes spoken Chicago, Milwaukee, St. Paul and Pacific Railroad Company? Is that the desire of all the defendants, to have all of those [13] railroads already named and also this last one named by the Court as appearing in Cause No. 3923?

Mr. Tjossem: If the Court please, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company was not a party to the proceedings before the Interstate Commerce Commission entitled *Alouette Peat Products, Ltd., vs. United States of America*.

The Court: Mr. Tjossem, I am not concerned with that now. I am concerned with the answer to any question so as to make this record clear whom you wish to be appearing or regarded by the Court as appearing as intervening defendant railroads in this case.

Mr. Tjossem: In the consolidated cases you have named the intervening railroad defendants, your Honor.

The Court: Do they wish and do each and all of them wish the Court to understand that those railroad intervening defendants are now before this Court as such intervening defendants?

Mr. Tjossem: That is correct, your Honor.

The Court: Now, in Cause No. 3924 do the intervening defendants wish the very same identical rail-

roads, each and all of them, to be regarded by the Court as appearing in that case?

Mr. Tjossem: That is correct, your Honor. [14]

The Court: Very well. Do the plaintiffs have any objection?

Mr. Beresford: Not at all, your Honor.

The Court: Then the Court so regards with respect to the identity and fact of appearance of each and all of the intervening railroad defendants named by the Court. The plaintiffs may proceed with the introduction of plaintiffs' evidence in these cases.

Mr. Beresford: Your Honor, all I have for the case are exhibits—excuse me, are the transcripts of the proceeding before the Interstate Commerce Commission which have hitherto been filed with this court on March the 13th——

The Court: Do you wish to take those things in your hand and request that they be passed forward to the clerk for the purpose of being given an identification mark or marks and then do you wish to make a statement about offering such papers?

Mr. Beresford: Yes, your Honor.

The Court: Very well. Is it feasible to mark them all as one exhibit, Mr. Beresford?

Mr. Beresford: It is not, your Honor. They are divided, I believe, into five separate——

The Court: Does that appear obvious to anyone handling them? [15]

Mr. Beresford: Yes, your Honor.

The Court: As to the nature of content, does a similar division of the material suggest itself, and,

if so, on what basis of material content does any division of the material suggest itself?

Mr. Beresford: The entire five are the proceedings below. They are separated, however, and the front sheet of each one contains an indication which I believe would suggest the division into five categories. They are bound together into five different groups by a blue ribbon, as the Court will notice.

The Court: Let each one of those separately blue ribboned bound sections of the material mentioned by Counsel receive from the clerk a proper exhibit identifying mark, as Plaintiffs' Exhibit 1, 2, 3, and so forth.

(Alouette ICC Record was marked Plaintiffs' Exhibit No. 1 for identification.)

The Court: Mr. Bailiff, will you let Counsel on both sides see this part of the material mentioned marked Plaintiffs' Exhibit 1 to see if they can agree upon a statement which Plaintiffs' Counsel or some other Counsel could make which would give it a name which characterizes the content of the exhibit, and that name ought to be in one word or two or three words [16] if that is possible, so that in the future you can call it by that name and everybody knows whether you are referring to Plaintiffs' Exhibit 1 or some other number of plaintiffs' exhibit.

(Acme ICC Record was marked Plaintiffs' Exhibit No. 2 for identification.)

The Court: I ask the bailiff to let Counsel see Plaintiffs' Exhibit 2 for a similar purpose. I ask you to consider suggesting a name first for Plain-

tiffs' Exhibit 1 which reasonably reflects the nature of its contents.

(Ex parte 162 ICC Report and Order was marked Plaintiffs' Exhibit No. 3 for identification.)

The Court: Also Plaintiffs' Exhibit 3 may now be submitted to Counsel.

(Kipp's Peat Tariff X162 and Supplement was marked Plaintiffs' Exhibit No. 4 for identification.)

The Court: Also Plaintiffs' Exhibit 4, I ask you to submit that to Counsel.

(Haynes Peat Tariff #1352 was marked Plaintiffs' Exhibit No. 5 for identification.)

The Court: Plaintiffs' Exhibit 5, I ask you to submit that to Counsel. [17]

(Brief pause.)

The Court: Do Counsel on both sides wish these exhibits to bear a file number of the clerk's office of 3923 or the other number of the companion case, or do they wish each and all of these exhibits to bear the clerk's file number of both cases? Mr. Beresford?

Mr. Beresford: I would suggest both cases, your Honor.

The Court: Is there any objection to that, Counsel?

Mr. Tjossem: No, I concur in that, your Honor. They should be filed in both cases.

The Court: Very well. I ask the clerk in case of every exhibit marked by the clerk with an identifying mark on his records that the exhibit bear both

clerk's file numbers just mentioned. Now would Counsel for the plaintiffs take up each one of these marked exhibits 1 to 5 inclusive and give each one a name, what he would term and believe honestly reflects the nature of the information contained in it, or something to give it a characterization different from every other one of the exhibits. Mr. Beresford?

Mr. Beresford: Your Honor, for No. 1 I would suggest "The Alouette Record". For No. 2—— [18]

The Court: Plaintiffs' Exhibit 1, "Alouette Record", is that right?

Mr. Beresford: Yes, your Honor.

The Court: Record where?

Mr. Beresford: I didn't——

The Court: Record where, where made, where created?

Mr. Beresford: Before the Interstate Commerce Commission.

The Court: The initials "ICC Record", "Alouette ICC Record" would be——

Mr. Beresford: Yes, your Honor.

The Court: Very well. The next one?

Mr. Beresford: "The Acme ICC Record."

The Court: The next one?

Mr. Beresford: "Ex parte 162".

The Court: That is No. 3?

Mr. Beresford: Yes, your Honor.

The Court: Ex parte with reference to what tribunal or proceeding or what?

Mr. Beresford: ICC, your Honor.

The Court: Ex parte ICC what?

Mr. Beresford: No. 162.

The Court: No, no, I mean what did you call it? Oh, just by the number? [19]

Mr. Beresford: Yes, your Honor.

Mr. Tjossem: I think it would be clearer, your Honor, if we would add the words "Report and Order".

The Court: "Ex parte ICC Report and Order"?

Mr. Tjossem: Yes, "ICC ex parte 162 Report and Order", and that would clearly identify it.

The Court: "Ex parte", what is the number?

Mr. Tjossem: 162.

The Court: "Ex parte 162 ICC Report and Order"?

Mr. Tjossem: Yes.

The Court: That will be the name of it. The next one?

Mr. Beresford: "Kipp's Tariff" is No. 4, your Honor.

The Court: K—i what?

Mr. Beresford: K-i-p-p's, your Honor.

The Court: Tariff number what, or does it have a number?

Mr. Beresford: It would be No. 162.

The Court: Look at the title of it on the paper and also look at the contents and then will you repeat what name it is you wish to suggest for it? You used the word "Kipp's" a moment ago. I do not know [20] whether you still wish to favor that or choose something else.

Mr. Beresford: Your Honor, in its entirety it is "Tariff No. X162".

The Court: Does it have an author who is well known to shippers and railroad people?

Mr. Beresford: Yes. Mr. Kipp.

The Court: K-i-p-p?

Mr. Beresford: Yes, K-i-p-p.

The Court: Does this tariff relate to some commodity that is of interest in this litigation?

Mr. Beresford: It relates to the peat, your Honor, that is the subject of this litigation.

The Court: Kipp's Tariff?

Mr. Beresford: Well, Kipp's Tariff No. 162 and Supplement.

The Court: Kipp's P-e-a-t Tariff No. X162 and Supplement. Does that seem to be accurate?

Mr. Beresford: Yes, your Honor, that would denominate it.

The Court: Then the next one? There is at least one more.

Mr. Beresford: This would be Haynes, H-a-y-n-e-s, Tariff No. 1352.

The Court: 1352. Is it Haynes Peat Tariff? [21]

Mr. Beresford: I didn't hear you, your Honor.

The Court: Is it Haynes Peat Tariff, or does it relate to some commodity other than peat of which this case will take an interest?

Mr. Beresford: No, it's only peat, your Honor.

The Court: H-a-y-n-e's Peat—

Mr. Beresford: There is no apostrophe, your Honor. Haynes is his name.

The Court: How do you spell it?

Mr. Beresford: H-a-y-n-e-s, without the apostrophe.

The Court: Very well. Haynes Peat Tariff No.—

Mr. Beresford: 1352.

The Court: Anything else?

Mr. Beresford: That's all, your Honor.

The Court: Do you offer each one of these Plaintiffs' Exhibits 1 to 5, inclusive?

Mr. Beresford: As an identified record or a certified record of the proceedings before the Interstate Commerce Commission.

The Court: Any objection to the offer?

Mr. Tjossem: I have no objection to the offer except that I do want to say this, your Honor, [22] that Exhibits 3, 4 and 5 do not constitute part of the record before the Interstate Commerce Commission in either the Alouette or Acme Peat cases.

The Court: Do you have any objection to the offer in evidence?

Mr. Tjossem: I have no objection to the offer in evidence.

The Court: Each one of these exhibits is now admitted.

(Plaintiffs' Exhibits Nos. 1, 2, 3, 4 and 5 for identification were admitted in evidence.)

[See Exhibit 2 at pages 147-406, Exhibit 4 at pages 407-411.]

The Court: You may proceed with introduction of further evidence, if you have any to offer.

Mr. Beresford: The plaintiffs rest, your Honor.

The Court: Each and all the defendants may now proceed with their case in chief. By "defendants" the Court means each and every kind of de-

defendant by every name and description and every party opposed to the plaintiffs' action in these two consolidated cases.

Mr. Roberts: Speaking for the defendant United States of America, your Honor, pursuant to the answer filed by the United States, we take a neutral position pursuant to the provisions of Title 28, [23] Section 2323, and tender the defense specifically to the Interstate Commerce Commission.

Speaking now for the Interstate Commerce Commission, the defense of this action is now tendered to the intervening railroads.

Mr. Tjossem: Speaking on behalf of all the intervening railroad defendants, we have no proof to offer in this record and again request the right to reserve our opening statement until the time of our opening argument.

The Court: The Court will have to consider it waived because then what we will hear will be argument. You will not need any opening statement.

Mr. Tjossem: Yes, your Honor.

The Court: The defendants then waive their opening statement. As I understand it, all the defendants rest now. Is that right?

Mr. Tjossem: That is correct, your Honor.

The Court: Now the Court understands we have reached the time when it would be proper for Counsel to begin their arguments on the merits in these cases. From now on until the Court's decision is announced does anyone wish the court reporter present for any reason whatsoever?

Mr. Beresford: The plaintiffs do not, your [24] Honor.

Mr. Tjossem: The railroads do not.

Mr. Roberts: The United States and the Interstate Commerce Commission do not, your Honor.

The Court: Very well. The reporter is excused. We will take a very short recess, about three or four minutes, after which we will proceed with the arguments. Court is so recessed.

(Thereupon, oral argument was presented to the Court by respective Counsel. At 12:00 o'clock Noon a recess was taken until 2:00 o'clock p.m.)

Tuesday, June 12, 1956

2:00 o'clock p.m.

(All parties present as before.)

(Further oral argument was presented to the Court by respective Counsel. At 4:00 o'clock p.m., a recess was taken until 10:00 o'clock a.m., Wednesday, June 13, 1956.) [25]

Wednesday, June 13, 1956. 10:00 o'clock a.m.

(All parties present as before.)

(Further oral argument was presented to the Court by respective Counsel, after which the following occurred:)

Mr. Beresford: Your Honor, may I ask for the privilege of opening up my case in chief for the purpose of introducing an exhibit?

The Court: The Court understands that plaintiffs' Counsel asks that plaintiffs' case in chief be opened for further proof.

The Clerk: It will be marked Plaintiffs' Exhibit No. 6.

The Court: Just a minute. Is there any objection to this request?

Mr. Tjossem: I think it's a little late in the day for him to be reopening his case now, Your Honor.

The Court: Would it be any prejudice, do you think, Mr. Tjossem?

Mr. Tjossem: I don't know the nature of the proof that is being offered.

The Court: You may take the time, Mr. Beresford, to explain it to opposing Counsel.

Mr. Beresford: I have just given Counsel a [26] copy of the exhibit.

Mr. Tjossem: I see a sheet before me with some figures on it and some names on it, but I wish Counsel would explain what it purports to be.

The Court: Just take the time to consult with him and explain it to him, Mr. Beresford, so he may understand what it is.

(Brief pause.)

Mr. Tjossem: Counsel explains to me, Your Honor, that this is a computation showing certain mathematical totals, and I'm not in a position to pass on the accuracy of it. I might state this: On freight charges in the railroad our auditors handle that problem and I'm not prepared and I don't feel I have the authority to state for all of the railroads that we can accept these computations as being an accurate audit of the charges as they are purported to be shown. We would feel that we should have the opportunity of auditing the state-

ment the same as we always do before we concede that any calculation by some other party is the correct amount of any charge.

The Court: Do you or do you not object to the request to open up the plaintiffs' case in chief for the purpose of introducing that exhibit?

Mr. Tjossem: I do object, on the grounds [27] that we have not had sufficient notice or an opportunity to verify the accuracy of the information.

The Court: Let the record show what it is you want to offer, and then the Court will have to sustain the objection. Let it be marked by the clerk as plaintiffs' next exhibit.

The Clerk: 6, Your Honor.

The Court: Plaintiffs' Exhibit 6.

(A paper containing computations was marked Plaintiffs' Exhibit No. 6 for identification.)

Mr. Beresford: Should I make my offer?

The Court: The Court is required, I think, to sustain the objection to the request of the plaintiffs to open up the plaintiffs' case in chief, and it is sustained. Now you may make your record, Mr. Beresford, as to what you want to do in so opening, and you may refer to what it was you wished to do.

Mr. Beresford: Your Honor, in making my offer of proof I wish to open up the case and offer to prove by this exhibit a computation of the various totals of the overcharges that we contend were made in this case. The computation, which I would have no objection to being subject to mathematical check-

ing by Counsel, is simply a total of the figures which are already in evidence in this file and in this case, the [28] total of the figures found under the Rule 100 proceeding, the number of which I have already referred to this Court just a few moments ago.

There are three columns on this exhibit. The first column is the total taken from the Rule 100 order, the Rule 100 order showing on its face that the six cent maximum was allowed and the 20 per cent was disallowed in arriving at that total.

I have then caused to be prepared Column 2 of this exhibit, which gives the total additional overcharge if the six per cent per hundredweight is not allowed, or six cents per hundredweight was disallowed.

Then Column 3 is merely a total of Columns 1 and 2 showing the total amount of the overcharge if the entire rate, both the six cent maximum and the 20 per cent, is held to be void and based upon the old base rates.

The Court: I would say for the information of offering Counsel that the plaintiffs have no absolute right to introduce a computation made by them for the convenience of the plaintiffs or for the convenience of the Court. Sometimes and many times in many different actions before the Court computations and analyses and studies and reports made up for the purpose of [29] accommodating witnesses and Counsel and the Court are received in evidence. The burden is upon Counsel to get his proof in, and if he cannot compose the differences between him

and opposing Counsel regarding this computation, why then I say in concluding that there is no absolute right to have it in. I would have supposed that both sides would have wanted something concrete, but I cannot determine that for Counsel. That is a privilege certainly each Counsel has to prove or disapprove as a matter of right. The ruling of the Court might be different if it pertained to something as to which the plaintiffs had an absolute right.

Mr. Tjossem: Could I address the Court again on this subject?

The Court: Yes.

Mr. Tjossem: I would just like to say this, Your Honor: I would like to accommodate Counsel if I could in having such a statement before the Court, but what they have done here for the first time, and this is the first I have seen of it, is to go back and take a whole series of rates applying to various routes throughout the United States and make a computation on what they say that rate should have been and apply that against hundreds of shipments and come up with what they say the answer is, and I am not in a position [30] and I feel in all fairness to my clients I cannot accept their computation as being correct in that respect, and I regret that I didn't——

The Court: The objections to the request of plaintiffs to open up their case in chief for that purpose are sustained.

(Plaintiffs' Exhibit No. 6 for identification was refused.)

The Court: You may proceed with further argument.

(Mr. Beresford presented further oral argument to the Court.)

The Court: In these two actions, from a preponderance of the evidence the Court finds, concludes and decides as follows:

That the action is one for reparations and in particular for the amount of overcharges exacted from the plaintiffs by the defendant railroads.

That this Court does have jurisdiction to hear and determine this action.

That the alleged overcharges and exactions by defendant railroads of plaintiffs were under the pretended authority of a void increase in freight rates for Canadian peat.

That the rates illegally applied by the [31] defendant railroads to those shipments were without authority of law because, to the extent of the rate excess over and above the previously valid rates, such rates were not authorized by law because not promulgated in the manner provided by law nor in the manner specified and expressly conditioned by the Interstate Commerce Commission.

That defendant railroads have no right in law or in equity to keep such overcharges, and are legally bound to repay them to the plaintiffs.

That this record does show the extent of the illegal exactions and alleged damages in detail in Plaintiffs' Exhibit 2 at a place marked by a white tab labeled "Plaintiffs' Interstate Commerce Commission Exhibits" and in particular ICC Exhibit

No. 3, beginning on the first sheet of that exhibit and extending through the succeeding four pages, which show the number of carloads shipped from British Columbia to the various points of destination and show the rate charged on account of the shipment under the illegally exacted rates.

That the rates which had previously been approved and were in effect immediately before the initiation of the proceedings by the defendant railroads for the purpose of obtaining an increase in the rates [32] were the legal rates applicable to these shipments here in question at the time they were made, and that all rates applied to plaintiffs' shipments and all sums of money exacted from plaintiffs by applying such freight rates to the extent of the excess of such rates over said prior existing approved rates are and were illegal and void and without legal right, and the plaintiffs have the right in this action to recover from defendant railroads all such illegally exacted and collected sums.

That the foregoing applies to both Cause No. 3923, entitled Alouette Peat Products, Ltd., plaintiff, and to Cause No. 3924, entitled Acme Peat Products, Ltd., et al, plaintiffs, each of said causes being against the United States of America, et al, and that in each of said causes the material allegations of plaintiffs' complaint are sustained by the facts disclosed by the record in this case, and plaintiffs in each case are entitled to judgment against the defendants as prayed for in their respective complaints, and that plaintiffs are entitled to their costs in this action against the defendant railroads.

I would like to fix a time for settling the findings of fact, conclusions of law and judgment in each of these two cases, and at that time I ask plaintiffs' Counsel to finally present a correct [33] summarized computation of each and all of those items mentioned by the Court and previously dealt with in argument, namely, which may be found on that ICC Exhibit No. 3, being a part of Plaintiffs' Exhibit 2 and being indicated in that exhibit file by a white tab labeled "Plaintiffs' ICC Exhibits" etc. I wish plaintiffs' Counsel to cooperate with defendants' Counsel in respect to the accuracy of that computation and summary and to try in a proper way to get the approval of defendants' Counsel respecting the accuracy and propriety of that being used by the Court for the determination of the exact amount in dollars and cents of the judgment in each case to be awarded to the plaintiffs against the defendants. If you cannot by that time, which the Court will now fix for settling the judgment, obtain defendants' Counsel's approval of that statement for use by the Court, then I say to Counsel on both sides that the Court will require plaintiffs to offer proof upon the total amounts of the dollars and cents to be recovered in each of the two cases by way of computation and summarization of the facts shown or indicated on those pages in less practical form and detail. If it is required to take proof, the Court will proceed to do so at that time. In the absence of agreement plaintiffs' Counsel will [34] be required to offer oral or other proof at that time or run the risk of the Court entering a different

judgment than that indicated here. Defendants' Counsel will be permitted, in case oral testimony is taken of plaintiffs' witnesses on this summarization and computation, to introduce further proof in rebuttal of any additional proof which may be offered by plaintiffs. But the Court will take no proof if Counsel are able to agree on a proper summarization of the computations of those detailed figures.

Does anyone know of any issue tendered by any one of the complaints or any one of the answers in either one of these actions which has not been determined by the Court's orally announced decision? (No response.)

I wish to do this further work at the earliest possible date. This case is continued until Monday afternoon, the 18th day of June, at two o'clock, that being this coming Monday, for the purposes mentioned. Also I ask of plaintiffs' Counsel to immediately prepare and as soon as possible serve upon defendants' Counsel proposed findings of fact, conclusions of law and judgment.

Court is now recessed until two o'clock this afternoon and those connected with this case—— [35]

Mr. Beresford: Might I ask the Court a question?

The Court: Those connected with this case will be excused until two o'clock this coming Monday. Yes.

Mr. Beresford: One question I would like to ask the Court. Since there are such a multitude of mathematical computations, just for the matter of verifying them could we have a day or two more?

The Court: No. By reason of future calendar

matters, the Court must do it Monday afternoon. Let's proceed to do it by that time. I think both Counsel can do it by that time. I want to finish this case and turn to something else.

Court is so recessed and those connected with this case are excused.

(Thereupon, at 12:00 o'clock Noon, a recess herein was taken until 2:00 o'clock p.m., Monday, June 18, 1956.) [36]

Monday, June 18, 1956. 3:10 p.m. o'clock p.m.

(All parties present as before. In addition, Mr. Fred H. Tolan, Attorney at Law, appeared with Mr. Beresford and Miss Locke in behalf of plaintiffs.)

The Court: At this time I wish to take up the Alouette and Acme matters. I wish to take up the matter of settling the proper forms of findings of fact, conclusions of law and judgments. You may proceed.

(Some papers were handed to the Court by Mr. Beresford.)

The Court: What comment, Mr. Beresford, do you wish to make about whether or not these are true and correct findings in accordance with the Court's orally announced decision?

Mr. Beresford: Your Honor, we have had the Court's oral opinion typed. To the best of our knowledge these are true and correct findings. I think that Mr. Tjossem and myself are in agreement as to the amounts. Mr. Tjossem will express himself on that point. Mr. Roberts, however, has a suggested cor-

rection in the preamble, to which we have no objection. We just were unable to get together until today on that suggested correction. [37]

The Court: What is the suggestion?

Mr. Roberts: Yes, Your Honor, and I believe all parties are agreed to it. On Page 2 of the findings, Your Honor please, commencing on my copies with Lines 2, 3 and 4, I have some suggested changes in the nature of describing my participation as Counsel both for the United States of America and appearing for the Interstate Commerce Commission.

The first interlineation would appear on Line 2 of Page 2 after the words "United States of America", and because it is somewhat lengthy I would suggest that the interlineation be made on the heading of the page. Following the words "United States of America" I suggest these words: "having, by its answer filed herein, taken a neutral position in this controversy".

The Court: Is there any objection to that?

Mr. Tjossem: No objection, Your Honor.

Mr. Beresford: No objection, Your Honor.

The Court: Where should that be inserted?

Mr. Roberts: That should be inserted, Your Honor, on Line 2 after the words "United States of America".

The Court: You represent the intervening defendant Commission, do you not? [38]

Mr. Roberts: I do, Your Honor, and I will make other changes to show that relation.

The Court: I asked that question of Mr. Tjossem.

I assume the answer by him is "No". Is that right?

Mr. Tjossem: That is right, the answer is no, I do not.

The Court: But Mr. Roberts also represents the Interstate Commerce Commission in the same manner?

Mr. Roberts: That is correct, Your Honor.

The Court: Why not have this insertion after—

Mr. Roberts: Because, Your Honor, the interests of the defendant United States of America are different from those of the ICC.

The Court: All right. After "United States of America", is that where you want to make this insertion?

Mr. Roberts: That is correct, Your Honor.

The Court: What are the order and how many are there of them?

Mr. Roberts: I will read the words. "having, by its answer filed herein, taken a neutral position in this controversy".

The Court: I always find some way of [39] getting interlineations physically inserted, and I will undertake it now. "h-a-v-i-n-g", and what is the next?

Mr. Roberts: Comma, "by its answer filed herein, taken a neutral position in this controversy".

The Court: Taken what?

Mr. Roberts: "a neutral position in this controversy".

The Court: Why not "in this action"?

Mr. Roberts: "in this action" would be most proper, Your Honor.

The Court: Comma after "action"?

Mr. Roberts: Yes, if Your Honor please.

The Court: Then where is the next insertion?

Mr. Roberts: The next insertion is on Line 3 after the words "Interstate Commerce Commission" delete the comma, then the word "having" and after the word "having" these words inserted:—

The Court: You wish to delete the word "having" or keep that word?

Mr. Roberts: No, Your Honor, delete the comma before and after the word "having" and insert these words—

The Court: After "having"?

Mr. Roberts: After "having," "submitted their case on written brief and having". [40]

The Court: By "their" you mean "its," the Interstate Commerce Commission, do you not?

Mr. Roberts: Yes. I used the plural form because it had been used in the typewritten form, your Honor.

The Court: "submitted their" what?

Mr. Roberts: "their case on written brief and having."

The Court: B-r-i-e-f?

Mr. Roberts: Yes, your Honor, singular.

The Court: "and having" what, comma?

Mr. Robert: "and having," then we continue with the script, the typewriting. The last change is on Line 4 after the words "tendered in open court" striking the two following words "the defense" and inserting in their place "oral argument." So that

it would read, "tendered in open court oral argument."

The Court: That is all, is it?

Mr. Roberts: There is one other comparable change, your Honor, in the judgment as entered by the Court. Turning now to Page 1 of the judgment and the last typewritten line on that page, Line 32.

The Court: Page 1?

Mr. Roberts: That would be Page 1 of the judgment, Line 32, after the words "States of America" [41] insert these words: "having taken a neutral position in this action."

The Court: What else? A comma after "action?"

Mr. Roberts: Yes, your Honor. Then on Page 2 of the judgment on Line 1 thereof after the words "Commerce Commission" insert these words——

The Court: After "Commission." You inserted it after "having" before, did you not?

Mr. Roberts: I was going to say just after the word "Commission" striking the comma and inserting these words: "having submitted their case on written brief and." And then on the next line down after the words "tendered in open court" the two following words "the defense" are stricken and the words "oral argument" substituted for them.

The Court: Very well. Anything else?

Mr. Roberts: There are no other changes, if your Honor please, and all of these I believe are agreed to by all parties.

The Court: Any objection on anyone's part?

Mr. Beresford: No, your Honor.

Mr. Tjossem: No, your Honor.

Mr. Roberts: May I further address the Court? Unfortunately in weighing the time, your Honor, I had set appointments for two o'clock for this afternoon [42] earlier last week and I have continued them until 3:00. I have six witnesses to interview. I believe that my participation here is sufficient when I state for the record the position of the Interstate Commerce Commission to these findings, conclusions and judgment, and that is that the Interstate Commerce Commission respectfully takes exception to the Court's entering same. With that statement for the record I pray that the Court excuse me from further attendance at this time.

The Court: Any objection to excusing him?

Mr. Beresford: None, your Honor.

Mr. Tjossem: No objection, your Honor.

The Court: You may be excused, and the Court notes in the record that exception at this time, to take effect as and of the time when the findings, conclusions and judgment may be entered.

Mr. Roberts: Thank you, your Honor.

(Mr. Roberts left the courtroom.)

The Court: Mr. Beresford, is there anything you wish to say in behalf of the—did you intend to be understood by the Court as saying that Mr. Tjossem representing the railroads and yourself representing the plaintiffs have agreed that these calculations are accurate? [43]

Mr. Beresford: Your Honor, as I understand it, these calculations have been taken from the order

of the Interstate Commerce Commission which is in the file and we have agreed that the computation is correct. Is that correct?

Mr. Tjossem: Well, I would like to restate that if I may, your Honor. I have agreed with Counsel that I would stipulate that he has in determining the amounts taken the amounts as shown by Interstate Commerce Commission Rule 100 statement, has multiplied the weight of each shipment as used for the purpose of determining the freight charges by six cents per hundred pounds; that this method would add to the reparations there shown to be due the amount of the additional reparation allowed by the Court, and that his computation was done in an accurate manner. I will so stipulate.

The Court: Will you also stipulate that the Court may use those calculations with like effect as if Mr. Beresford or some other witness had during the trial orally testified and orally stated they were correct calculations?

Mr. Tjossem: Could I reserve my statement on that until I make my objection? I think it will become apparent to your Honor why I feel I should. If [44] I can state my—I have one principal objection, your Honor.

The Court: Yes, you may.

Mr. Tjossem: To the form of the findings, conclusions and judgments, and I think when I state that it will become apparent to your Honor wherein I have my difficulty.

Let me first say that on behalf of the railroads intervened in this case we do except to the entry

of the findings of fact, conclusions of law and judgments on the grounds that the Court is committing error when it enters, if it enters, a judgment reversing the Commission or awarding damage against any of the railroad intervening defendants.

We have raised these points of law, they have been overruled in your Honor's rulings on the motion and in the ruling on the merits and we will not repeat our argument here. I simply want it to be shown in the record that we still object and do except on that basis.

Now turning to the main ground of my objections to the presently proposed findings of fact, conclusions of law and judgments, I would point out to the Court that I appeared in this action as Counsel for the following railroads that sought authority to [45] intervene and were permitted to intervene in this action pursuant to Title 28, Section 2323, to-wit: In Cause No. 3923 I intervened on behalf of and the following railroads were admitted as intervening parties in this suit: The Union Pacific Railroad, the Southern Pacific Company, the Great Northern Railway Company and the Northern Pacific Railway Company. In Cause No. 3924 the following railroads were permitted to intervene as defendants: Chicago, Milwaukee, St. Paul and Pacific Railroad, the Union Pacific Railroad, the Southern Pacific Company, the Great Northern Railway and the Northern Pacific Railway.

Now, while I have some smaller objections, I would like to turn first to my main objection. The

findings of fact, conclusions of law and judgment as tendered to the Court purport to enter a judgment against railroads who are not parties to this action, whom I do not represent, who so far as I know have no knowledge or have never had notice of this proceedings, and since I do not represent them I can't speak for them but I do feel I have the duty to the Court to point out that these parties who I will name are not parties to this suit. I might say that no process so far as I know was ever issued or served on any railroad in this proceeding. [46]

The following railroads have never appeared or otherwise, until this judgment has been tendered, been mentioned in this court proceeding: The Duluth, Winnipeg and Pacific Railway Company, the Minneapolis, St. Paul, Sault Sainte Marie Railroad Company, the New York Central Railroad Company, the Wabash Railroad Company, the Boston and Maine Railroad.

In the findings of fact the Court is asked to find, for example, on Page 7 that there is due the several plaintiffs by the Duluth, Winnipeg and Pacific Railway Company a total of \$11,988.39. The same treatment is given the other railroads which I named, and that is carried over into the judgment where it is provided in Paragraph IV on Pages 4 and 5 that a judgment be entered against the Duluth, Winnipeg and Pacific Railroad Company in the amount of \$11,988.39, the Minneapolis, St. Paul, Sault Sainte Marie Railroad Company in the amount of \$17,034.18, the New York Central Rail-

road Company in the sum of \$1,641.67, the Wabash Railroad in the amount of \$8,179, the Boston and Maine Railroad \$11,114. Then again the Minneapolis, St. Paul, Sault Sainte Marie Railroad Company \$2,224.98.

Now, of the carriers that I represent here as intervening defendants, there are only two named in the proposed findings and judgment that intervened [47] in this case at all; that is the Northern Pacific and the Great Northern. As to those two railroads I would say this: The action as stated in the complaint was brought pursuant to Section 28 U. S. C. A. Section 1336, and that is the section that authorizes actions to review an order of the Interstate Commerce Commission. That same section is carried forward into the proposed findings in Paragraph I and as stated in the proposed Finding II on Page 2, "That this action is brought for the purpose of having this Court review the decision and orders of the Interstate Commerce Commission, as more particularly hereinafter set forth."

When an action is brought to review an order of the Interstate Commerce Commission pursuant to Section 28 U. S. C. A. Section 1336 the parties before the Commission as a matter of right have a right to intervene. Our petitions in intervention show that we intervened under Title 18, Section 2323, in support of the Commission's order, that the appearance by the intervening defendants in this cause does not furnish an adequate jurisdictional basis for this Court to now enter a personal monetary judgment against any of the intervening

defendants. Now, that is the main objection that I have.

The Court: This certainly is a rather late [48] day in the litigation to raise that objection. That should have been raised before trial. I understood you represented these western railroads, especially the three of them, Mr. Tjossem, the Great Northern, the Northern Pacific and the Milwaukee.

Mr. Tjossem: I have stated to the Court that I do represent them, but the point I am making to the Court—

The Court: Do you represent the Union Pacific?

Mr. Tjossem: I am an attorney employed by the Great Northern Railway Company. When this suit was brought I wrote to the Southern Pacific, the Union Pacific, the Milwaukee and the Northern Pacific and asked them if they wanted to appear or if they wanted to authorize me to appear for them. They have written to me saying that I might appear. That is the only representation I have made to this Court. The petitions in intervention are limited to those companies. I have never been in correspondence with nor do I know anything about these other companies who have now been brought into this case for the first time by this proposed findings of fact, conclusions of law and judgment. I can't speak for them, I have no authority to speak for them, I don't represent them. I pointed this out [49] because I feel I owe a duty to this Court to point out the limits of its jurisdiction.

The Court: Do you have any objection to any

item here calculated to be due as not due by any of these carrying intervening defendant railroads?

Mr. Tjossem: I'm sorry, I didn't follow that, your Honor.

The Court: Mr. Reporter, will you read it.

(The reporter read the Court's question.)

Mr. Tjossem: I am unable in the shortness of time to ascertain whether the amount stated for the individual intervening railroads is correct. I have agreed to stipulate and I will stipulate that they have taken the Rule 100 statement, have multiplied the weight shown in there of each shipment by six cents per hundred pounds, and that that calculation will in total add to the total award of reparations the amount that this Court would allow in addition to what the Commission allowed in that statement, and beyond that I cannot stipulate.

The Court: Have you any objection to the identity of the suing plaintiffs mentioned in the findings?

Mr. Tjossem: I have no objection to that. I do have, in addition to the general objection which [50] I have stated, an objection to one word in Finding No. 6 on Page 5, in Line 19 I believe it is. That sentence reads, "That the publication of the tariffs herein referred to were made on a 5-day shortened period of publication pursuant to Ex Parte 162, which order directed authorized increases to be made on said 5-day notice." I object to the use of the word "directed." The order was permissive, and I would suggest the substitution of the

words "which order permitted authorized increases to be made."

The Court: Have you any objection to that?

Mr. Beresford: No, your Honor.

The Court: Will it have any effect on whether or not he is entitled to recover against the railroads who participated in that permission?

Mr. Tjossem: No, it doesn't. It's just——

The Court: Then in Line 19 strike the word "directed" and insert in lieu thereof the word "permitted?"

Mr. Tjossem: "Permitted" is right, your Honor. Now for the record I would like to also except to the conclusion of law No. 3 wherein it is stated, "That where shipments of peat, as set forth in Finding X hereinbefore, have been carried over a route involving more than one carrier, said carriers are jointly and [51] severally liable for the refund of the excess charges thus illegally exacted." for the reason that the rule of law there stated applies only where the carriers are guilty of a tortious act, and it is my position and I understand the Court's decision here that we have charged rates which were above the level of rates which the Court has found to be legally applicable, and if that is the ruling of the Court our action in so charging those rates is a matter of breach of contract, not of tort liability, and that there is no joint or several damage; that the damage is individually to the carrier in so far as it participated in a movement and to the extent it did collect the charges which the Court found was in excess of the lawful rate.

The Court: I would like to hear your response to this objection, Mr. Beresford, to Conclusion No. 3.

Mr. Beresford: Yes, your Honor. The case in point is Lewis-Simas-Jones Co. vs. Southern Pacific Co., which is found in 283 U. S. at Page 654.

Mr. Tjossem: Is that 283, Counsel?

Mr. Beresford: 283 U. S. 654. Reading from Page 660, "The Act prohibits every excessive charge, whether exacted directly or obtained by indirection, and its provisions are designed to prevent the evasion of the rule that every charge for transportation shall [52] be just and reasonable. The collection by a common carrier of exorbitant charges is a tort." Citing cases. "The general rule as to liability of joint tort-feasors applies where two or more connecting carriers combine to impose excessive charges for transportation over their connecting lines." Citing cases. "Defendant is liable for any violation of the Act by it that caused or contributed to cause damage to plaintiff without regard to the proportion of the charges attributable to foreign transportation or paid to the foreign carrier."

The Court: That is sufficient. I cannot take up so much time.

Mr. Beresford: Well, that's right in point on it, your Honor. It expressly holds—

The Court: What year was that decided?

Mr. Beresford: That is 1930. There has been no change since then.

The Court: Now, Mr. Tjossem, was there any-

thing else about the findings and conclusions you wish to state?

Mr. Tjossem: No, that completes my statement.

The Court: Very well. Then I wish to hear from Mr. Beresford about this very important point raised about those not served and that those who [53] especially authorized Counsel to appear by intervention are in effect the only railroads suable in this action.

Mr. Beresford: Your Honor, the situation there is, first, the facts of this case show that Mr. Tjossem appeared for all of these railroads.

The Court: Where are the facts?

Mr. Beresford: That's in Exhibit 2. If I may have it I will—I'm making the point to begin with that Mr. Tjossem before the Interstate Commerce Commission appeared for all of the railroads involved here, not only those—that's a preliminary point, your Honor. I'll show that in the evidence. May I pass on to save time?

The Court: Yes.

Mr. Beresford: That is to be found in Exhibit 2, Document 3, which is the transcript of the proceedings in the Acme Peat case, wherein Mr. Tjossem appears officially for all defendants.

The Court: All those named in this action?

Mr. Beresford: All those named in this action, and the complaint, which is Document 1 of Exhibit 2——

The Court: Which complaint in which court?

Mr. Beresford: The complaint before the [54] Interstate Commerce Commission, lists all the rail-

roads that Mr. Tjossem appeared for before the Interstate Commerce Commission, which are all the railroads named here. Then this is an appeal from that proceedings, your Honor, where there was a full appearance there by Mr. Tjossem. Then the statute expressly provides, this is Title 28 U.S.C.A. Section 2322, that the action is to be brought against the United States, which we did. That's why the named plaintiff here is the United States. Any railroad that desires may intervene.

The Court: Did you correctly state your mind? You said that is why the plaintiff is the United States.

Mr. Beresford: I beg your pardon. Did I say the plaintiff?

The Court: Yes.

Mr. Beresford: I meant the defendant.

The Court: "The reason why the defendant is the United States."

Mr. Beresford: Then any railroad that desires may intervene. All parties have notice because it is an appeal from a proceeding in which they all appeared before the Interstate Commerce Commission. This Court under that section has jurisdiction over all of the parties. Now, it makes no difference what—— [55]

The Court: Read where the Court is given jurisdiction in this review proceedings over all of those who appeared before the Commission.

Mr. Beresford: Your Honor, I thought I brought that volume of the United States Code with me.

Maybe we have it written down in longhand. Do you have it?

Mr. Tjossem: I have the applicable section here (handing book to Mr. Beresford).

Mr. Beresford: Title 28, your Honor, commencing with Section 2321:

"The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter."

This is the old volume. Is this up to date? Ex-me, Mr. Tjossem.

Mr. Tjossem: I believe it is.

The Court: What section is it that you wish?

Mr. Beresford: 2321 and sequel, your Honor.

The Court: Of what volume?

Mr. Beresford: Title 28. [56]

(A book was handed to Mr. Beresford.)

Mr. Beresford: Your Honor, I'm now reading from Section 2321:

"Procedure generally; process

"The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

"The orders, writs, and process of the district courts may, in the cases specified in this section and

in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.”

2323: “The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

“The Interstate Commerce Commission and [57] any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.”

Now, that in its essence is the way this action is brought. If the other railroads desire to intervene——

The Court: Read the particular provisions of the statute which you interpret to mean the proceeding here is one of a review or appeal and not a new action.

Mr. Beresford: Your Honor, this case of United States vs. Interstate Commerce Commission which I read to you the other day, not thinking this point was coming up we didn't bring it again. That's the one in 93 Law Edition which confers jurisdiction on this Court for such an appeal in interpreting this statute, and this statute provides——

The Court: There must have been some other

case where a point similar to this has been raised where some party appearing before the Commission did [58] not appear in the District Court and contended that he was not before the District Court. There must be some such case.

Mr. Beresford: There is one case right here I see in the annotations. "A provision authorizing intervention by the United States. The United States under the provisions of this section is a necessary and indispensable original party, and hence intervention is unnecessary." That's the *Lamberton Coal Company vs. Baltimore and Ohio Railroad*.

The Court: I want a decision that says that the appearance originally before the Commission continues to be such during the review proceedings before this Court. That is very plain.

Mr. Beresford: Your Honor, the statute provides that they are not necessary parties. I perhaps am not making my point clear. The only party under the amended statute is the United States. The statute expressly provides——

The Court: Do you mean before the Commission or in this court?

Mr. Beresford: On the appeal. The only necessary party is the United States. The statute that I read to you covers the option upon the railroads that were parties to the proceeding before the Commission. [59]

The Court: Read the statutory words that give this Court jurisdiction to do anything with respect to those proceedings before the Commission.

Mr. Beresford: I'm reading Chapter 157. "Interstate Commerce Commission orders; enforcement and review" is the chapter head. And then the procedure generally—the statute that gives the power—I have been reading because Counsel raised the point on the procedure. The statute that gives the power, which is the statute that I read to the Court the other day, is 49 United States Code, Section——

The Court: Will Miss Locke go with the bailiff and get that? This point was not argued the other day, was it, whether or not there are some of these defendants not before this Court? That has not been raised before, has it, during this trial?

Mr. Tjossem: No, your Honor. It was never asserted here to my knowledge that they were trying to reach anyone beyond the United States and to reverse the order of the Commission, and it has not been raised.

I might say, if I may at this time, that we have raised this same point in this way: I think that this difficulty leads you to the jurisdictional question which we did argue on our motion, that the jurisdiction of this Court in this proceeding is limited to considering [60] the lawfulness of the Commission's order and to follow the Commission's order, the jurisdiction is limited to reversing that order and remanding these proceedings back to the Commission for further proceedings consistent with your Honor's opinion, and that is where your jurisdiction ends.

Now, we have argued that in our preliminary

motion, I raised it again in my trial brief, I argued it again to you the other day. I don't want to be repetitious but this I think, your Honor, illustrates the difficulty that arises when the Court tries to extend its jurisdiction beyond a mere review in appellate proceedings and to enter a monetary judgment.

The section which Counsel was reading, if you will notice, Section 2321, applies to orders of the Interstate Commerce Commission other than for the payment of money. If you have an order of the Interstate Commerce Commission for the payment of money, that action is brought pursuant to Section 13 of Title 49.

Mr. Beresford: Your Honor, Section 16 applies where a reparations judgment has been entered by the Interstate Commerce Commission and the railroads have refused to pay it. Then in that event there is a direct suit brought upon that Interstate Commerce [61] Commission judgment in the Federal District Court. This applies to all other proceedings, such as the one which we have brought here.

The gist of Counsel's argument would be this, that this Court should not enter a money judgment, so we would then go back to the Interstate Commerce Commission where there are no further issues of fact to be argued, and then Counsel could do as he stated in his argument here at the time of the trial in chief of this case, he stated what the railroads did do, and that is refuse to pay the reparations order, so that it would be necessary to bring

another action in the District Court to enforce the judgment. That certainly is much beyond—well, it just makes an unnecessary middle step.

I will have the section here. The Court is given jurisdiction. The matter of jurisdiction we called to the Court's attention during the course of the trial. That is Title 28, Section 1336, which provides,

“Except as otherwise provided by act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate [62] Commerce Commission.”

Then pursuant to that we read to the Court the case of Interstate Commerce Commission vs. United States, which did——

The Court: I am anxious for you to as soon as possible get to the point in the words of the statute which deal with the nature of this Court's jurisdiction, being a review or being original or being whatever it is.

Mr. Beresford: May I yield to Miss Locke on this point, your Honor?

The Court: Yes, you may.

Miss Locke: We are having the U. S. vs. ICC case brought down, your Honor. That is the case which discusses the particular form of action, and it discusses this as being an appeal rather than——

The Court: Have you a statutory word or provision you can read from a statute that says what the nature of this Court's proceeding is, whether it

is merely by way of review or whether it is some original action?

Miss Locke: The Supreme Court has said that it is a review action rather than an original action and that the procedure should be the procedure in these statutory sections. The statute I don't believe in so [63] many terms would cover it.

The Supreme Court in that case which we read to your Honor the other day and which we will now read again goes on at some length in that under the Interstate Commerce Act, which is 49 U. S. C. A. Section 9, there is provided an election of remedies, and that section provides that persons damaged may either go before the Interstate Commerce Commission or before the courts, and in the leading case in 93 Law Edition it was urged that because the parties had originally gone before the Interstate Commerce Commission they had made an election and could not go before the courts, and the Supreme Court said in answer to that that that section applied only to original actions and not to their right to appeal from the Interstate Commerce Commission to the courts and allowed that sort of action, which is exactly the kind of action we have copied here in coming from the Interstate Commerce Commission to this Court, and the Court definitely states there that the parties should have a right of appeal and says that it does not believe that Congress intended to deny the right of appeal to the parties.

The Court: Where in the findings have you a statement as to who is liable, what railroads?

Mr. Beresford: Paragraph X. [64]

The Court: You have the Great Northern and who else?

Miss Locke: We have taken the——

The Court: You have the Northern Pacific on Page 8.

Miss Locke: Yes, your Honor. On Page 7, Line 1, is the Great Northern, Line 11 the Duluth, Winnipeg and Pacific Railway.

The Court: I want to know, of these others that we are talking about, the local railroads, how many of them are stated?

Miss Locke: On Page 8 is the Northern Pacific, your Honor.

The Court: Does Mr. Tjossem say that he represents and did intend to represent that concern, that defendant?

Miss Locke: Yes, your Honor.

Mr. Tjossem: Yes, I represent the Northern Pacific as an intervening defendant.

The Court: Will you name the others, please, that you do appear for in this particular case expressly?

Mr. Tjossem: Yes, sir. The Great Northern Railway Company, the Northern Pacific Railway Company, the Southern Pacific Company; Chicago, Milwaukee, St. Paul and Pacific, and the Union Pacific Railroad. [65]

The Court: In this case you claim that you did not appear for anybody else, is that right?

Mr. Tjossem: That's right. I agree, your Honor, that I did appear before the Commission as one of

Counsel for all of the defending railroads, but in this court I only appeared for those railroads and I was only authorized to appear for those railroads. I have had no communication with the other railroads whatsoever.

The Court: How many of these calculations are there, if any, as to which these defendants are not liable, these ones last named? In other words, saying it in another way, are the G. N., the N. P., the S. P., the Milwaukee and the U. P. each and all liable for each and all of these items in your calculations, Mr. Beresford?

Mr. Beresford: Your Honor, in answer to your Honor's question, the Great Northern only, looking at Page 7, would be liable for the calculations listed under Great Northern, that there is no liability on the part of the Northern Pacific or other western railroads here. The same would be true in so far as the Northern Pacific is concerned on Page 8. There are, however, places in the calculation where the Milwaukee appears but didn't happen to be the entering railroad [66] so we did not in the interests of uniformity segregate it in that manner, not thinking that this question would come up.

Your Honor, if I could just call to the Court's attention again the fact that the statute makes only——

The Court: I am trying to get you to point out the words in the statute that say that this Court is reviewing and not entertaining original jurisdiction. That is what I am trying to get you to do,

and if you can do that, that will settle all of these questions in the Court's mind.

Mr. Beresford: Well, reading from 1336, I think this answers the question.

The Court: All right.

Mr. Beresford: "Except as otherwise provided by act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission."

The Court: I have never witnessed while I was on the bench and performing the functions of a judge in this court any case where as to a party not appearing in this court in the proceeding immediately before the Court the Court entered a judgment against [67] such absent and nonappearing defendant. I do not recall any instance where the Court has done that, with the possible exception of reviews of commissioners of one kind or another as to which the statute is very specific, but never before do I recall of having brought into question the authority of this Court in any review proceeding or any other kind of proceeding and never heard it seriously asserted before that this Court has authority in the absence of express appearance or general appearance by operation of law by acts of the defendant to enter any judgment against a defendant.

Mr. Beresford: Your Honor, since this court is the appellate court—

The Court: Yes, sir, but will you please keep on—and I cannot say it too often, I wish you to

point me out a statutory word that says what you say is the situation or a statement of the Supreme Court which says it. All you do is to comment by comment without it being backed up by anything. You may proceed.

Miss Locke: If it please the Court, we have now the United States vs. Interstate Commerce Commission which appears at 337 U. S. 426, and I would like to read from that case. In that case at Page 433 it is stated that, "The Commission and the railroads contend [68] that Section 9 of the Interstate Commerce Act bars the United States or any other official from a judicial review of an order denying damages in reparations in proceedings before the Commission." And further down on that page the Court states that, "Under the contention the order is final and not reviewable by any court even though entered arbitrarily without substantial supporting evidence and in defiance of law. Such a sweeping contention for administrative finality is out of harmony with the general legislative pattern of administrative and judicial relationships." And the Court goes on on Page 435 to state, "So we can find nothing in the language of Section 9 that bars the court from reviewing a reparation order upon allegations by a shipper that the order was entered in defiance of standards established by Congress to determine when reparations are due."

The Court: I do not wish to take action upon this. If you think you can find some case holding on an issue like that raised by Mr. Tjossem that the

Court can proceed against those railroads who have not appeared here, then the Court will be at least as well informed as you could inform a Court whose jurisdiction is appellate as far as this Court is concerned. But what you are proposing to do is to ask the Court to [69] take this risk and make this great big leap without showing the Court any express statute word or any express court ruling that those parties, and going further and saying that those persons who appeared in the Commission's proceeding are still before the Court on that judicial review. There are many instances where we have judicial reviews by the court of first instance in which the court of first instance is not given appellate jurisdiction since the Circuit Court of Appeals or the Supreme Court of the United States are given such jurisdiction. That ought to be spelled out in some Act or spelled out in some ruling of some court.

Miss Locke: We feel, your Honor, that this case does——

The Court: But that does not raise the question here stated. That is talking about subject matter, that is not talking about parties.

Miss Locke: Your Honor, the Court——

The Court: That is what you said it was talking about. My remarks refer to what you read in the decision.

Miss Locke: Yes, your Honor. The Court states that, "The Attorney General appears as statutory defendant and states that the Interstate Commerce Act [70] contains adequate provisions for protec-

tion of Commission orders by the Commission and by the railroads when, as here, they are the real parties in interest, for whether the Attorney General defends or not the Commission and the railroads are authorized to interpose all defenses to the government's charges"—the government being the plaintiff,—“and claims that can be interposed to charges and claims of other shippers. In this case the Commission and the railroads have availed themselves of the statutory authorization.”

The Court: That does not hold anything that is on this issue at all, according to my way of looking at it.

Miss Locke: Well, we feel, your Honor, that it is a clear holding that the necessary party defendant is the United States of America and that any parties who wish to intervene on the judicial review have the right to intervene on the judicial review just as in any other appeal, any party can come in as respondent and defend if they wish to defend.

The Court: Where are the statutory words? Did the United States object to the jurisdiction over it because it did not appear? You see, this question is raised directly, it is not raised inferentially, it is raised directly by a person or a party that was [71] before the Commission which says it never has been a party here and therefore is not bound by this Court's judgments and in all other proceedings of first instance. It is true that this Court, like any other Court of first instance, gains no jurisdiction merely by filing in this action. There must be process against the defendant named, and it is

not a process against any absent party not joined. That is the normal situation in this court.

Miss Locke: That's true, your Honor. I was trying to find a wording in this case which says that the action is to be brought against the United States in accordance with the statute.

The Court: You may sit down a moment and see if you can find it.

(Brief pause.)

The Court: Maybe we had better continue this until some other day, until ten o'clock day after tomorrow, and see if you can get something on it. Maybe you can find something on it.

Mr. Beresford: Your Honor,—

The Court: I would like to have a Supreme Court decision or a Circuit Court decision or the word of a statute on it.

Mr. Beresford: Since we didn't anticipate [72] that point, that would give us more chance to advise the Court of the law.

The Court: The matter is continued until—

Mr. Tjossem: If the Court please, I have commitments tomorrow and Wednesday. Could it go over until Thursday?

The Court: No, not if it is the 21st. Will you be free tomorrow?

Mr. Tjossem: Well, I possibly could be free at ten o'clock tomorrow morning.

The Court: How about two o'clock?

Mr. Tjossem: Well, our General Counsel is coming out and he has asked me to sit in on a meeting with all General Counsel meeting here in Seattle

and he has asked me not to have anything arranged for tomorrow or the next day, your Honor.

The Court: I think this is necessary because this court will not be in session in Seattle during the last week in June nor the first two weeks in July, and so this matter is continued until tomorrow afternoon at two o'clock for further proceedings. Let these papers be returned to Counsel.

(Thereupon, at 4:20 o'clock p.m., a recess herein was taken until 2:00 o'clock p.m., Tuesday, June 19, 1956.) [73]

Tuesday, June 19, 1956

2:00 o'clock p.m.

(All parties present as before.)

The Court: I wish to find out what the authority is for the plaintiffs on this issue between the plaintiffs and the railroad intervening defendants about who is before the Court in this review proceeding. What authority do you have?

Mr. Beresford: Your Honor, we now, I'm quite certain, have exhausted the subject. Since this appellate procedure dates only from the Interstate Commerce Commission case and, as expressly stated in the Circuit Court of Appeals case, on the same Interstate Commerce case after it had been reversed, that is the '52 decision rather than the '49 decision, the question was only touched upon and not specifically decided.

There is no authority expressly holding that all of the railroads are before this Court. It was and still is our position that because this is an appeal and

this Court is serving in an appellate capacity, that all the parties that were in the proceedings below are here, but in deference to the—well, we have prepared alternate pages for the conclusions if the Court, because [74] there is no definite authority on the point, feels that it should be remanded, we have corrected the last two pages of the conclusions of law and the judgment to so provide.

The Court: The Court feels under all the circumstances that that is the best way to handle it. Is there any objection to that? And then there will be no amount of damages awarded in favor of the plaintiffs against the defendants at this time.

Mr. Beresford: No, your Honor.

The Court: Will you substitute the pages? You may sit in the chair next to Mr. Tjossem to see if you can find a means of accomplishing the result desired that is agreeable with him. If Miss Locke can be of help, she may do that.

(Brief pause.)

The Court: I would like Mr. Tjossem to have the opportunity of expressly approving or disapproving of the form.

Mr. Tjossem: I have been advised, your Honor, of what is being accomplished, and I would have a few comments after the Court has the documents before him.

The Court: Very well.

Mr. Beresford: Might I add one word of explanation, your Honor. The judgment being a shorter [75] instrument, since I had the time to do it over completely I have in the judgment incorporated the

changes made by Mr. Roberts and agreed to by all parties yesterday.

The Court: Now, Mr. Tjossem, I will hear you.

Mr. Tjossem: If the Court please, the plaintiffs now have substituted revised pages 9 and 10 in the——

The Court: Of the findings and conclusions?

Mr. Tjossem: Of the findings and conclusions of law. Actually it merely substitutes conclusions of law. In so doing the plaintiffs still leave in the findings of fact in Paragraph X in which it asks this——

The Court: On what page?

Mr. Tjossem: Page 6 of the findings of fact. It commences on Page 6, through 7 and 8.

The Court: And you have not agreed to that, is that it?

Mr. Tjossem: No, I have not agreed to anything, your Honor.

The Court: Do you wish the Court to find those facts?

Mr. Beresford: Your Honor, as I understood the stipulation yesterday——

The Court: I did not understand it to be stipulated that these were the facts. He stipulated to [76] something, but it was not clear to me. As I understood his statement yesterday it will be necessary for the Court to hear additional proof on the accuracy of these figures.

Mr. Beresford: In which event, since it is being remanded anyway, I think that that paragraph can

be deleted. May I speak to Mr. Tolan just a moment?

The Court: Yes.

(Brief pause.)

Mr. Beresford: And we would stipulate that Paragraph X may be deleted.

The Court: Will you take out everything that should be taken out, and why don't you confer with Counsel again about it with a view to avoiding useless record statements and useless effort on your part, the part of Counsel on both sides.

(Brief pause—Counsel confer privately.)

Mr. Tjossem: If the Court please, Counsel and I apparently cannot yet agree on the propriety of including Conclusion of Law No. 4 on the second substituted page. It is proposed in that Conclusion No. 4, "That the Interstate Commerce Commission violated its own rules and as a result thereof denied the plaintiffs due process by granting a second petition of the [77] railroads for reconsideration as more particularly set forth in its Order of June 21, 1954."

Counsel stated to me the basis for that conclusion is the Court's statement in its oral decision that the Court found that the plaintiff had proved all of the material allegations of the complaint.

My position is that that is a conclusion of law and that the Court in ruling did not rule that the Interstate Commerce Commission violated its own rules; and further, the Court did not rule that the plaintiffs had been denied due process of law.

I submit that conclusion should be stricken.

The Court: I think the conclusion is a correct one in view of what the Court thought about the circumstance of the Commission violating its own rules. Whether or not the Court had it in mind specifically in stating as a fact that all material allegations had been sustained by the preponderance of the evidence, the Court still thinks that that finding is correct and that it is correct so far as the violation of that rule is concerned and that this conclusion is correct, and the Court favors this conclusion of law.

Mr. Beresford: May I just make——

The Court: Yes.

Mr. Beresford: I'm wondering, since I have [78] taken Pages 7 and 8 out, if the Court should renumber——

The Court: That is a detail we can easily handle. You have No. 10. No. 10 will have to be stricken out. Look at your No. 10 finding on the bottom of Page 6.

Mr. Beresford: Just that last paragraph can be scratched out because it all relates to the two pages that were taken out.

The Court: I have deleted all of that remaining part of Paragraph X of the findings at the bottom of Page 6. Will Counsel now take an opportunity of carefully looking at what is left of the findings and conclusions. Let opposing Counsel see them first and see if there is any other inconsistency. Do you have a conclusion that this action should be remanded to the Commission for further proceedings there to determine something or to do anything?

Mr. Beresford: To fix the amount of reparations since——

The Court: Have you said that in the judgment form?

Mr. Beresford: Yes, your Honor, and that is identical language to the conclusions.

The Court: Do you see anything now objectionable from the defendants' standpoint in the proposed [79] findings and conclusions?

Mr. Tjossem: No, they have been corrected in the manner which we have discussed here.

The Court: Is your attitude such that you do not wish to note your approval on them?

Mr. Tjossem: I do not wish to note my approval.

The Court: Today's date is what?

The Clerk: The 19th, your Honor.

The Court: Where is the most important fact finding in your proposed findings of fact which finds that something was done that supports any one or more of the five separate conclusions of law, Mr. Beresford?

Mr. Beresford: The principal one, your Honor, is to be found in Paragraph V of the findings and Paragraph VI, which shows the facts upon which the violation of 162 are shown.

The Court: Do you propose in your findings in substance and effect a statement of fact that the procedural steps to be taken under the law by the railroads in effectuating a legal increase in rates were not taken, and that they were overcharged on a new rate which was then invalid?

Mr. Beresford: I have that.

The Court: And that they have been damaged [80] to the extent of the difference between the old valid rate and the new invalid one?

Mr. Beresford: While of course I don't have the exact phraseology, I have those basic facts in Paragraph VI, your Honor.

The Court: I am anxious to see that. That sentence in Line 2 at the top of Page 5, was there any condition to the Commission's approval of that 20 per cent increase? Did it condition its approval to the carriers doing anything procedurally or otherwise?

Mr. Beresford: In that sentence, yes, your Honor, I might clarify it to add——

The Court: What about notice?

Mr. Beresford: I was just going to say a five day notice, although could I amend that by adding——

The Court: I was just asking what the condition was, then we will talk about it.

Mr. Beresford: The condition was that the rate be published on a five day shortened notice.

The Court: Was that done?

Mr. Beresford: It was not done.

The Court: Then it would be appropriate from the Court's standpoint to put that in there. That was the point the Court was getting at, that procedurally the railroads did not comply with the conditions [81] imposed by the Commission. It could be stated in another fact like that. "Pursuant to certain procedural conditions"—"Subject, however, to a prior publication of some"—what was the detail there?

Mr. Beresford: Five day, your Honor, shortened notice.

The Court: Subject, however, to what? To publication by the railroads?

Mr. Beresford: Proper publication by the railroad on a five day——

The Court: To proper publication of a five day notice?

Mr. Beresford: Yes, your Honor, on a five day notice.

The Court: Publication on a five day notice, is that the word?

Mr. Beresford: Five day written notice.

The Court: "To proper publication of specified notice, which was not done." I think it would be more convenient to put that in after the "per ton". Put the period following "ton" in Line 5 or 6, whatever the number is, to a comma and add these words: "and subject to the condition"——

Mr. Beresford: Your Honor, before you write it in might I make one suggestion? [82]

The Court: Yes.

Mr. Beresford: "subject to the condition that all authorized increases"—I think that is quite important—"that all authorized increases be made on the five day written notice."

The Court: "and subject to the condition that the authorized"——

Mr. Beresford: "that all authorized".

The Court: Well, "the".

Mr. Beresford: Yes, "the authorized".

The Court: You are talking about the ones the

Commission did authorize upon certain conditions.

Mr. Beresford: I think that's correct, your Honor.

The Court: "subject to the condition that the authorized increases be given specified publication"?

Mr. Beresford: That's correct, your Honor.

The Court: "which was not done".

Mr. Beresford: Your Honor, instead of "which was not done", what was actually done was that an unauthorized increase was published, but I guess "which was not done" would amount to the same conclusion.

The Court: "which was not done". "subject to the condition that the authorized increase be given specified publication, which was not done." That is [83] the complaint.

Mr. Beresford: That's correct, your Honor.

The Court: I am initialing that on the margin. Now what other examples are there, according to your contention, of factual finding which are essential to the conclusions proposed?

Mr. Beresford: Paragraph VI when read with Paragraph V discloses that the rates that were published were unauthorized rates and hence in violation of Section 63.

The Court: In each factual statement there ought to be a specification of what it was that was wrong about it, and that is what I have done here. I have tried to give you that illustration. What is wrong about this: "In instances where a special commodity rate was published for peat, the

full 20 per cent was published and exacted." What was there wrong by that?

Mr. Beresford: It was not authorized by Ex Parte 162, which was an unauthorized freight rate increase.

The Court: Then the rates were special commodity rates. How does that compare with what these were?

Mr. Beresford: They were not authorized under [84] 162.

The Court: "Which 20 per cent and which increase and which special commodity rates were not authorized."

Mr. Beresford: That's right.

The Court: I want to insert that, then, right there. That is what my recollection is.

Mr. Beresford: I didn't hear the Court.

The Court: I say I want to insert that, and that is what my recollection is as to what was shown by the record.

Mr. Beresford: That is correct, it is what——

The Court: "That such 20 per cent increase and such commodity rates were not authorized." That insertion will go in Lines 14 and 15 after the word "rates", following the period following "rates" and before the words "That accordingly". Now, is there any other situation like that?

Mr. Beresford: Well, Your Honor, in Line 17—

The Court: "were unlawfully". "That accordingly from January 1, 1947 until January 1, 1948, shipments of peat or peat products originating from

points in British Columbia"—"were unauthorized, they were unlawfully made".

Mr. Beresford: Yes, Your Honor. [85]

The Court: "were unlawfully made subject to"—where would be the best place to put the word "unlawfully", or "improperly", some word to show it was without right that that was done? What word would you choose and where would you think it should be put?

Mr. Beresford: I would think the place of the word "unlawfully" would be after the word "were" in Line 17.

The Court: Does anyone have a better or different suggestion to make? Following the word "Columbia" is the word "were". The Court will put in there "unlawfully."

Mr. Beresford: Your Honor, in Line——

The Court: Now wait just a moment. I want to call your attention to this: "That the publication of the tariffs herein referred to were made on a 5-day" notice. Was that rightfully or unrightfully done?

Mr. Beresford: I was going to suggest that in Line 18, "of the unlawful tariffs herein referred to".

The Court: Is not what you intend to strike at by suggesting that finding which you believe was reasonably within the Court's decision, is not the fact that publication was made of this action was not a lawful publication, they had no right to [86] make that publication?

Mr. Beresford: It was not authorized. It was not authorized by 162.

The Court: "the tariffs herein referred to", do you mean the 20 per cent and the 6?

Mr. Beresford: Yes.

The Court: "That the publication of the tariffs in this paragraph referred to were wrongfully made" or "unlawfully made"—"were wrongfully made." "in this paragraph referred to"—mark out "herein." It reads now, "That the publication of the tariffs in this paragraph referred to were improperly made." That is what you mean, is it not?

Mr. Beresford: Yes, your Honor. In the next line then, to make the whole sentence read correctly, "pursuant to" should be stricken and put "in violation of" instead.

The Court: I do not quite get the place, Mr. Beresford. I do not quite get the place nor the sentence. Do you mean following "Ex Parte 162, which order permitted"?

Mr. Beresford: Just prior to that, Your Honor, where it says at the beginning of the line between 19 and 20 on the numbered page——

The Court: Yes. [87]

Mr. Beresford: "of publication pursuant to Ex Parte 162," I suggest that "pursuant to" be stricken and "in violation of" substituted.

The Court: "were improperly made on a 5-day shortened period of publication" what?

Mr. Beresford: "in violation of".

The Court: I approve of that. Now then, "which

order permitted authorized increases to be made on a 5-day notice." Does that add anything?

Mr. Beresford: Could I suggest that it be amended to read, "which order permitted authorized increases to be made only on 5-day short notice."

The Court: They did give a five day notice, did they not?

Mr. Beresford: But not for an authorized increase, so by adding the word "only" after "increases"——

The Court: "which order permitted only authorized"—"permitted only authorized".

Mr. Beresford: Yes.

The Court: "which order permitted only authorized increases to be made on 5-day notice." I believe the word "only" is the more emphatic to put there. "which order permitted only authorized increases".

Mr. Beresford: Yes, Your Honor.

The Court: Now what else is there? "That [88] on March 29, 1948, the carriers amended their master tariff to show the 6 cent maximum increase authorized on peat. Prior to said time, the carriers republished rates on peat originating in British Columbia to points in northern California by taking the full 20% increase." Is that the way you wish to leave that?

Mr. Beresford: In Line 23, Your Honor, "Prior to said time, the carriers unlawfully republished rates".

The Court: Now let me see where that is. Line 3. "Prior to said time, the carriers unlawfully republished rates". Does that relate to the same

things which you have complained of here in your complaint?

Mr. Beresford: Yes, Your Honor.

The Court: I have lost the place again. "Prior to said time, the carriers" did what?

Mr. Beresford: "unlawfully".

The Court: I have made that addition. VII is approved if it is clearly understood by all that that means the ones we are here talking about. Does anyone object to or wish to make any improvement of any of the statements made in Paragraphs VIII and IX? These dates as to when they were ordered, have you checked them carefully to see that no mistake was made?

Mr. Beresford: Yes, Your Honor. [89]

The Court: Mr. Tjossem, do you know of any inaccuracy in referring to those occurrences in the proceedings before the Commission?

Mr. Tjossem: No, they appear to be right to me, Your Honor.

The Court: And in IX, does anyone—who were the complainants in that case before the Commission?

Mr. Beresford: The plaintiffs herein, Your Honor.

The Court: The plaintiffs here. I think you should state wherever you use that word, you see, in Line 21 or 22 you use the words "plaintiffs herein" and then in the next line you use the word "complainants." You mean the same person, do you not?

Mr. Beresford: Yes, Your Honor.

The Court: Don't you think you ought to strike "complainants" and put "plaintiffs"?

Mr. Tjossem: The same correction in Line 25, Your Honor.

The Court: Yes. "That thereafter plaintiffs". Line 25, "complainants'", it would be "plaintiffs'", plural apostrophe.

Mr. Tjossem: Could I call the Court's attention to—— [90]

The Court: Yes, I would be glad to——

Mr. Tjossem: I would like to have you go back, if you would, your Honor, and reexamine your first suggested correction in Paragraph VI. I think it does not accurately state what the Court intends. As I noted the correction it read, "subject to the condition that the authorized increases be given specified publication which was not done."

Now, the contention is not, as I understand it, that the authorized increases were not published. The contention is that we published increases that were not authorized.

The Court: All that I am saying and intend to say by "which was not done" is that those increases which were authorized were not published as required by the order.

Mr. Beresford: I so understood it that way.

Mr. Tjossem: Well, your language is, "subject to the condition that the authorized increases be given specified publication, which was not"——

The Court: "which specified publication of authorized increases was not done." I will insert "of such authorized increases" if you wish. Instead of

“done” now, since I have changed the word I think “done” should be “made” now. What I am suggesting to modify [91] for the purpose of clarifying to meet the thought which Mr. Tjossem just then related, “and subject to the condition that the authorized increases be given specified publication of such authorized increases which was not made.” Does that make it clearer to your mind, Mr. Tjossem?

Mr. Tjossem: No, sir, it doesn't.

The Court: All I can say then is, “which authorized increases publication was not made.” That is the whole point of this, is it not, but some other increases were published? Is not that your understanding?

Mr. Beresford: That's my understanding, your Honor, yes.

The Court: “which publication was not done” or “made”. Which do you prefer, “done” or “made”?

Mr. Beresford: Either one, your Honor.

Mr. Tjossem: I have no choice.

The Court: “which publication was not done.” I am going to leave it like it is, because I do not think there is much choice. Is there anything else to be said about it? (No response.) As to findings and conclusions, let these findings of fact and conclusions of law be now entered.

I wish now to take up the form of the judgment. [92] What is there to be desired as to form from the standpoint of either party or either Counsel?

Mr. Tjossem: I notice in Conclusion 5 again they have used the word “complainants”. I hadn't no-

ticed it before. Do you want to substitute "plaintiffs"?

The Court: Yes. Where is that?

Mr. Tjossem: That is in substituted Page 2 of the conclusions of law in Conclusion No. 5.

The Court: The conclusion, you say?

Mr. Tjossem: Conclusion No. 5 reads, "That the complainants are entitled".

The Court: What line?

Mr. Tjossem: Line 8.

The Court: "That the plaintiffs are entitled to judgment against the defendants". I guess there will be other places that some of us have overlooked. Down in Line 12 the word "plaintiffs" is written, and so that is consistent.

Mr. Beresford: Your Honor, I have just noticed in Page 9 of the conclusions, just the page ahead of the one you've been looking at, Paragraph III, I have referred to Finding X which has now been removed, where I say in Line 27, "That where shipments of peat, as set forth"—— [93]

The Court: Yes, I see it. Do you want to mark out "as set forth"?

Mr. Beresford: Yes, "as set forth in Finding X hereinbefore." For "shipments," shouldn't it be substituted "herein complained of"?

The Court: Yes. Are the shipments mentioned in any other finding? IV, for instance? That is just naming the shipper, is it not? So that suggestion will take care of it. What is that, now?

Mr. Beresford: Strike out "as set forth in Find-

ing X hereinbefore" and insert "herein complained of".

The Court: "as herein complained of".

Mr. Beresford: Yes, your Honor.

The Court: I have done that also. Now let us turn to the judgment form. Is there anything wrong with No. 1? Of course No. 3 should be No. 2. They should be interchanged, should they not? It does not matter though, I guess.

Mr. Beresford: No.

The Court: Is there any objection to Nos. 2, 3? It will be No. 4 instead of No. 3. Nos. 1, 2 and 3 all appear on Page 2 with No. 3 running over onto the page which I will mark 3, previously unmarked, the third sheet of paper, and then following that is a [94] paragraph also numbered 3 which should be No. 4.

Mr. Beresford: Yes, your Honor.

The Court: I will mark it No. 4. Is there any objection to any one of these as far as form goes? Do you say anything about against whom the judgment here is ordered. You see, you get into the question of the identity of the defendants again, do you not?

Mr. Beresford: I think the only one we can have a judgment for costs against, your Honor, is the intervening defendants, isn't it?

The Court: It is authorized to have judgment against them. I think it should be so stated. After the words "awarded judgment," insert "against intervening defendants." Is there any objection to that term? (No response.)

Today's date is the 19th?

The Clerk: Yes, your Honor.

The Court: Let this judgment now be entered.
Counsel are excused unless there is something else.
Is there anything else, Mr. Tjossem?

Mr. Tjossem: No.

The Court: Is there anything else Counsel have
an interest in?

Miss Locke: That's all, your Honor.

The Court: Very well. Counsel are excused.

(Adjournment at 2:50 p.m.) [95]

[Endorsed]: Filed Sept. 4, 1956.

PLAINTIFFS' EXHIBIT No. 2

Record before the Interstate Commerce Commis-
sion in Docket No. 29974 as Certified by said
Commission to the District Court.

* * * * *

Before The Interstate Commerce Commission

Docket No. 29974

In the Matter of
ACME PEAT PRODUCTS, LTD., ET AL,
Complainants,
vs.

THE AKRON CANTON & YOUNGSTOWN
RAILROAD COMPANY, ET AL,
Defendants.

Plaintiffs' Exhibit No. 2—(Continued)
TRANSCRIPT OF STENOGRAPHER'S
MINUTES

117 Federal Office Building, Seattle, Washington, Wednesday, November 10, 1948.

Met, pursuant to notice, at 9:30 A.M.

Before: George J. Hall, Examiner.

Appearances: Fred H. Tolan, 1103 Smith Tower, Seattle, Washington, representing the Complainant;

A. J. Clynch, 404 Union Street, Seattle, Washington, representing Defendants;

R. Paul Tjossem, 404 Union Street, Seattle, Washington, representing Defendants;

Charles W. Burkett, Jr., 65 Market Street, San Francisco, California, representing Defendants;

Harold G. Boggs, 909 Smith Tower, Seattle, Washington, representing the Northern Pacific Railway Company, Defendant.

Proceedings

Exam. Hall: The Interstate Commerce Commission has set for hearing at this time and place this docket No. 29974, Acme Peat Products, Ltd., Et Al, versus the Akron, Canton & Youngstown Railroad Company, Et Al. Who appears for the Complainant?

Mr. Tolan: Fred H. Tolan, 1103 Smith Tower, Seattle, Washington.

Exam. Hall: Are there any other appearances on the behalf of the Complainant, or interveners on behalf of the Complainant? Apparently not.

Who appears for the Defendants?

Plaintiffs' Exhibit No. 2—(Continued)

Mr. Clynch: A. J. Clynch and R. Paul Tjossem, attorneys at law, 404 Union Street, Seattle, Washington, appearing as counsel on behalf of all Defendants in the proceeding. Mr. Tjossem will be here shortly.

Mr. Burkett: Charles W. Burkett, Jr., 65 Market Street, San Francisco, California, appearing for the Defendants.

Exam. Hall: Apparently there are no other appearances on behalf of the Defendants. On account of a continuation of Docket No. 30007, I will recess the hearing on Docket No. 29974 until 11:00 o'clock this morning. So those in attendance upon that hearing will be excused.

(Whereupon, recess was taken.)

Exam. Hall: It is now 11:45. We will continue with the [3] hearing on Docket No. 29974. Now, would you mind stating at the outset just what the issues are in this case, very briefly and succinctly?

Mr. Tolan: Docket No. 29974 was filed by the Canadian Peat Association and others seeking reparations from the Defendants for the excess sums assessed by them on carload shipments of peat moss above the six-cent maximum provided by the Interstate Commerce Commission's order in Ex Parte 62. Further, there is one remaining rate which has not been brought into compliance with the Interstate Commerce Commission's order, and that is the rate from the British Columbia producing area to the San Francisco Bay area. We are asking the Interstate Commerce Commission to prescribe the base rate in effect on December 31, 1946,

Plaintiffs' Exhibit No. 2—(Continued)

plus the increases, that is, the six-cent maximum and other increases to date.

Exam. Hall: How can the Commission prescribe a rate from British Columbia to San Francisco?

Mr. Tolan: Where *are* the carriers are voluntarily entered into a rate the Interstate Commerce Commission has jurisdiction from the Border for the main haul, from the Border.

Exam. Hall: I realize that. The American newspaper decision covers that, but you are asking for a through rate from British Columbia to California?

Mr. Tolan: That is right. I would like to put a witness on out of order. [4]

Mr. Tjossem: I would like to make a statement on behalf of the railroad Defendants, but with the understanding that I may make the statement later I will permit the witness to go on.

Mr. Tolan: That is agreeable. I will call Mr. Pittack.

A. H. PITTACK

was sworn and testified as follows:

Direct Examination

Q. (By Mr. Tolan): Will you give your name and address for the Reporter?

A. A. H. Pittack; 4000 First Avenue South, Seattle.

Q. What firm are you with?

A. Van Waters and Rogers, Inc.

Q. What are your duties with that firm?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of A. H. Pittack.)

A. Manager of the feed and fertilizer departments.

Q. Do you handle the sales of peat within that department? A. Yes.

Q. Do you handle the sales from British Columbia of peat within that department?

A. Yes.

Q. How long have you been handling the sales of peat?

A. With the firm of Van Waters and Rogers, since the end of 1938.

Q. Would you describe briefly your marketing setup for the handling of peat sales? [5]

A. Well, our marketing setup for the handling of peat sales is, we have several offices,—our offices are located in Portland; San Francisco; Los Angeles; Dallas, Texas; Spokane, and Billings, Montana; also, Boise, Idaho. Our policy in the handling of the sales of peat moss is in purchasing outright from the producer in British Columbia and selling to firms and dealers throughout most sections of the United States where the peat must move.

Q. Would you name two large marketing areas for peat, for the sale of peat?

A. Well, I would classify our major outlets here, what might be termed the Midwest section along the Mississippi Valley area from Chicago south, and somewhat west of Chicago; also in the State of California.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of A. H. Pittack.)

Q. Are you familiar with the fact that in 1947 the peat rates were increased 20 per cent from British Columbia? A. Yes.

Q. Do you know what the base rate was on peat in 1946 from British Columbia to the Midwestern points?

A. Well, the old base was 72 cents; I have forgotten exactly what the first increase was—20 per cent.

Q. In selling peat which you purchase from British Columbia, do you run into competition with other products from California? A. Yes. [6]

Q. Will you explain that competition?

A. Well, the competition that we run into in California are sales of peat moss in California,—I might say that the sale of peat moss in California would be mostly of the horticultural kind, that is, for use in gardening and horticultural work; and in California we run into substitutes in the form of bog peat or black top soil.

Q. Where does that occur?

A. That occurs wherever there is a lowland and lake area, and usually what it is is bottomland, decomposed vegetation, and that is brought out and dredged out and sold usually in a wet or semi-dry form. And then there is competition from various products such as ground bark. The Weyerhaeuser people manufacture some ground bark; and there are the California redwood people who manufacture ground redwood bark.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of A. H. Pittack.)

Q. Will you explain the use of that in competition with peat moss?

A. Yes, the use of ground bark for agricultural purposes is used much the same as peat moss; that is, it is worked into the soil. The California sales are mostly for purposes of mixing into the soil. The soil there is what you call the adobe, which is very hard, and with the application of moisture and then allowed to become dry, it gets quite hard; so it is desirable to have something such as peat moss or ground bark or some other material that [7] will help break the soil down into lumps; and in that respect the forest products such as ground bark can do a very reasonable or respectable job.

Q. Are there any other peat producers in California?

A. There are no peat producers in California producing peat moss of the same quality. However, in the Alturas region there is some competition of what they term peat. It is just slightly different as a product than our peat moss in British Columbia, which we term Sphagnum peat moss.

Q. What are the trade names of those peat substitutes?

A. In the forest products, one of them is called "Topper," that is, used for top dressing of the soil; and, if I am not mistaken, they call it "soil peet." They do not spell it "peat."

Q. Of the over-all sales of peat that you have in California, which of the two types of peat do you

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of A. H. Pittack.)

sell most, the horticultural variety or the poultry litter variety?

A. Our business is leaning very heavy towards the horticultural; I would say our business runs 75 per cent horticultural.

Q. Why don't you sell more of the poultry litter variety?

A. Well, in the poultry litter there are many, many competitive items; one of the considerations is the price of peat moss, that is, the delivered price of peat moss has been almost prohibitive; it has been increased considerably. The price has almost doubled.

Q. Since when?

A. Since 1939 or 1940. That is the delivered [8] price. I think a great deal of that has been due to the increase in rates, and as the delivered price of peat moss has increased we have run into all sorts of competition in the poultry litter field. For example, straw of almost any nature, pure straw, wood shavings, sawdust, and the like. Corn cobs,—green and dry corn cobs.

Q. May I ask that you restrict the answer to California. You don't use corn cobs in California?

A. No, that would be more in the Middle West.

Q. Will you kindly restrict your answers to California.

A. Well, you have wood shavings, sawdust, straws; and in California there is,—it is either taken in California or Arizona or New Mexico,—

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of A. H. Pittack.)

There is a sort of lava rock, a porous rock which has been processed and is used quite extensively for poultry litter.

Q. Has the production of peat moss and all kinds of fertilizers, in general, increased during the last three years? Speaking particularly of the prices?

Mr. Tjossem: I don't understand that this witness has qualified himself as an expert on fertilizer.

Mr. Tolan: He testified he was in charge of the feed and fertilizer department of Van Waters and Rogers and marketed fertilizers, including feed.

Exam. Hall: All right. The objection is overruled.

A. Are you speaking of manufactured fertilizer, [9] such as is produced by Swift and Company, for instance?

Q. (By Mr. Tolan): That is right.

A. Yes; the price of manufactured fertilizers has increased.

Q. Has the f.o.b. British Columbia price of peat moss increased in the past two years?

A. Yes, it has increased.

Q. How much?

A. The f.o.b. British Columbia price has increased greatly since 1939.

Q. In the last two years? A. It has not.

Q. Other fertilizers have increased in price, but peat moss has not increased in price?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of A. H. Pittack.)

A. That is correct when you are speaking of peat f.o.b. British Columbia.

Q. Do you sell peat in the Middle West?

A. Yes.

Q. After the 20 per cent increase went into effect on peat, raising the rates from 72 cents to 86 cents, did your sales suffer in the Middle West?

Exam. Hall: From and to where?

Q. (By Mr. Tolan): From British Columbia points to Iowa, for example.

A. You are referring to the Group D territory?

Q. Yes, D, E, and F. A. Yes. [10]

Q. Will you explain how that came about?

A. With your increased delivered price a great deal of pressure was put to bear by the manufacturers of substitute materials, and the higher delivered price of peat moss has opened the way for a more extensive use of these substitutes.

Q. What are those substitutes in use throughout the Middle West?

A. One of the main substitutes is a sugar cane product produced around New Orleans; I think around Raceland, Louisiana, where there is one; and there is another point in that vicinity. This is a processed sugar cane, a more or less processed material that is used for poultry litter, and the finely ground material is used for horticultural uses the same as peat moss. That is one of the main items of competition in the horticultural field, with the exception of the poorer grades of peat, or top soil,

Plaintiffs' Exhibit No. 2—(Continued)

Testimony of A. H. Pittack.)

which is brought in from low areas, and particularly the lake countries throughout Minnesota and Wisconsin; and then, again, in your poultry litter field are the dried and green corn cobs, with some light medication added, and, again, your straws, your oat hulls, and your forest products.

Q. Did you in 1946 write contracts for the sale of peat moss in western areas? A. Yes. [11]

Q. Were those contracts valuable in the western area? A. Yes, they were valuable.

Q. In 1947, I should say.

A. They were valuable. However, we ran into some trouble with some of our contractors in that they were unable to take the full amount of the contract, and in several instances we carried over the contract balances into 1948.

Q. Why did they refuse to take their full amount contracted for?

A. They simply said that the movement had been much less than they had anticipated, due to the stress of competition.

Exam. Hall: Are you pretty nearly finished with the witness?

Mr. Tolan: Yes; that is all.

Exam. Hall: Off the record.

(Discussion off the record.)

Cross Examination

Q. (By Mr. Tjossem): In testifying about the relative price of peat moss, 1946 compared with

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of A. H. Pittack.)

1948, you were speaking on the basis of f.o.b. Canada? A. Yes.

Q. Do I understand that you buy peat moss from Canadian producers f.o.b. Canada?

A. We buy some f.o.b.; in fact, we buy a great deal; and we buy some on a delivered basis. [12]

Q. For the first four months of 1947, would you say that most of the peat moss was bought on an f.o.b. Canadian origin basis or on a delivered basis?

A. Most of the peat moss was bought on a Canadian origin f.o.b. basis.

Q. By the way, are you familiar with the names of the companies complaining here?

A. I believe they are all represented, except one, I believe, up there.

Q. In making the statement that you just made with reference to your purchases in Canada, you are referring to the purchases that were made by the Complainants in this case?

A. That is true.

Q. I take it that when you buy f.o.b. Canada you pay the freight on it from Canada; is that correct? A. That is correct.

Q. And now you testified, as I recall, that with respect to the horticultural use of peat moss and with respect to the use of peat moss as poultry litter,—what is the difference, if any, between peat moss that is used for horticultural purposes as compared with peat moss that is used for poultry litter?

A. Granulation.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of A. H. Pittack.)

Q. By "granulation," you mean there is simply a difference in the fineness of the finished product?

A. Yes.

Q. Which one is finer? A. Horticultural.

Q. Other than that, the product is exactly the same? Both products are exactly the same, other than that? A. Yes.

Q. I also notice from your testimony that you find in California, as well as from the Midwest, considerable competition with other competing commodities, both with respect to the poultry litter form of peat moss and the horticultural form of peat moss; is that correct? A. Yes.

Q. With respect to the horticultural form of peat moss, one of the products in California consists of a ground bark of trees; is that correct?

A. That is correct.

Q. Now, from your own experience with your company, would you say that the ground bark of trees, when introduced into the soil, actually introduces some food into the soil?

A. I would say it does not.

Q. With respect to peat moss that is used for horticultural purposes, would you say that the addition of peat moss to the soil would add any food value to the soil?

A. It does not, but I would qualify that.

Q. Just a moment. You have answered it. That
[14] is sufficient. You stated that about three-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of A. H. Pittack.)

fourths of the peat moss sold in California was of the horticultural type; is that correct?

A. That is correct.

Q. What is your experience with respect to the type of peat moss that you sell from the Canadian origins into the Middle West, such as D and E territory? A. With respect to what?

Q. As to whether or not it is for horticultural purposes or for poultry litter?

A. Again, our experience is heavy to the horticultural rather than to the poultry litter.

Q. Taking the total sales from these Canadian producers, what percentage of your sales would be finely ground as horticultural peat moss and what would be sold as poultry litter?

A. Our sales run from 70 to 75 per cent horticultural.

Q. Do you know whether or not this peat moss product is used for any other purpose, and does your company sell it for any other purpose than poultry litter or horticultural purposes?

A. We don't sell it for any purpose, so far as we are concerned; those are the purposes for which peat moss is used.

Q. From your experience with the commodity, do you know whether it is used for other purposes?

A. Processed differently, I believe it has been tried for insulation. In the form of pads, it has been used, and, I believe successfully, in the ship-

Plaintiffs' Exhibit No. 2—(Continued)

Testimony of A. H. Pittack.)

ing of vegetables such as asparagus; such as [15]
asparagus pads; that is about the extent of it.

Q. It is used for packing material as well as
in the construction of homes?

A. I believe it has been tried for that.

Q. Do you know whether it has been success-
fully used in either one of those uses?

A. It is for the shipping of vegetables as aspara-
us pads, but I cannot say as to the insulation.

Q. I believe you testified with respect to the
period of time in which the full 20 per cent maxi-
mum increase in rates was published by the car-
riers after the Commission's decision in *Ex Parte*
62, and that your sales into the D and E groups,
in the Middle West declined; is that your testi-
mony? A. Yes.

Q. How much of a decline did you have? What
period do you use as a base period, and what de-
crease was there with respect to that base period?

A. From our experience, we will say, for the
year 1947; our sales of peat moss dropped from
100 to 25 per cent from the year previous.

Q. Was that decline uniform on both commodi-
ties of peat moss going into the Middle West terri-
tory? A. I would say yes.

Q. This cane material that you spoke of as
[16] being a competitive material, that is confined
to the Middle West? A. Yes.

Q. Is that competitive with both forms of peat
moss?

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of A. H. Pittack.)

A. Yes; they make both types, both fine ground and the coarsely ground.

Q. Where is that produced?

A. The sugar cane product?

Q. Yes. A. It is produced in Louisiana.

Q. You found it competitive in what territory with peat moss?

A. We found it strictly competitive to peat moss in the Middle West section; it is competitive to peat moss in California.

Exam. Hall: Well, now, I think you have covered the whole territory, on direct and cross examinations; how much more have you on that?

Mr. Tjossem: I think perhaps they will have other witnesses with respect to this subject, and therefore I can dispense with any further cross examination.

Exam. Hall: All right. You are excused.

(Witness excused.)

Exam. Hall: We will adjourn until 1:00 o'clock.

(Whereupon, at 12:10 p.m., hearing was recessed until 1:00 o'clock p.m. same day, same place.) [17]

Afternoon Session

(1:00 o'clock p.m., November 10, 1948)

Exam. Hall: The hearing will be resumed in Docket No. 29974. I understand there is another appearance?

Plaintiffs' Exhibit No. 2—(Continued)

Mr. Boggs: Harold G. Boggs, 909 Smith Tower, representing the Northern Pacific Railway.

Exam. Hall: You may proceed, Mr. Tolan.

Mr. Tolan: Mr. Strang.

ANDREW B. STRANG

was sworn and testified as follows:

Direct Examination

Q. (By Mr. Tolan): Will you please state your name and address?

A. Andrew B. Strang; 3438 West 9th Street, Vancouver, British Columbia.

Q. What is your business?

A. I am an accountant.

Q. How long have you been an accountant?

A. Approximately two and one-half years, for his firm.

Q. What firm is that?

A. Atkins and Durbrow, Ltd.

Q. You are familiar with their operations?

A. Yes.

Q. That company is the successor in interest to what company?

A. The British Columbia Peat Company, Ltd.

Q. Will you describe very briefly for the record the size of the company, its location, and general method of doing business?

A. Atkins and Durbrow now operates the peat bog located in the delta lands of the Fraser River in British Columbia. It employs approximately 90 individuals, and sells peat moss, both horticultural

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

and for poultry litter, for export to the United States, principally.

Q. And what are the values of your shipments?

A. We average roughly half a million dollars worth of peat moss produced and exported per annum.

Q. Exported, you mean to where?

A. To the United States market. 98 per cent of our production is exported to that market.

Q. How many bales do you produce per year, and what is the size of the bales?

A. That would average about a quarter of a million bales, 250,000.

Q. What is the approximate value of those bales?

A. The approximate value to our company would be about \$1.75 to \$1.80 per bale.

Q. To what areas do you ship into the United States?

A. We ship to all parts of the United States, but due to the fact that we have our own subsidiary company which acts principally as our sales outlet, [19] the greater section or portion of our production is placed in the Eastern states where the said sales organization is located.

Exam. Hall: What do you mean by the Eastern states? The Atlantic Seaboard?

The Witness: Atlantic Seaboard, sir, and principally those states coming west to the Mississippi River.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

Exam. Hall: You know out here people have a different idea with respect to what is east, and everything that is east of the Rockies would be east from here. You mean on the Atlantic Seaboard?

The Witness: I should qualify that and say the Eastern Seaboard States, the Mid-East States and the Central States.

Exam. Hall: East of the Mississippi River?

The Witness: Yes, principally.

Q. (By Mr. Tolan): Does Atkins and Durbrow sell peat on a delivered price basis?

A. It does.

Q. Where does it maintain sales offices?

A. We have them in, roughly, 10 cities: New York, Boston, Detroit, Chicago, Kansas City, Richmond, Virginia, and many others.

Q. Would you give the percentage of the Atkins and Durbrow production of the total produced in British Columbia?

A. We estimate that the ratio which our production holds to the total British Columbia production to be about 17 to 20 per cent. [20]

Q. That is, of all the Canadian production?

A. I would say, roughly, one-eighth, or 12 per cent of all Canadian production.

Q. How does the production of peat, as produced by you, differ from methods used by others?

A. There are two methods of drying the peat; we use what we call the hydraulic process; the first

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

method and the most common method is sun drying; the peat is picked up from the bog and stacked in various forms, sometimes in a way like a chimney, which creates its own draft, and it is dried by the sun and the wind.

Q. In shipping to the East, do you meet competition from shippers located in Eastern United States and Eastern Canada?

A. I wish I could have that question again.

Q. Do you, in marketing the British Columbia produced peat in the Eastern part of the United States, have competition from other producers located nearer the Eastern market than you are?

A. We do; we have a great deal of competition, and we are experiencing it now particularly. In the State of Maine, the Eastern provinces of Canada, notably New Brunswick, Nova Scotia, and to some extent Ontario; they all produce peat moss.

Q. Are you familiar with the fact that during most of the year 1947 the Eastern producers [21] enjoyed a 6 per cent maximum increase on peat moss shipments?

A. We are, definitely.

Q. How did you become aware of that fact?

A. Naturally, our sales organization would discuss that; we discovered that our prices were out of line with the others to the extent of almost 20 per cent, and naturally when we were checking up we discovered that a part of the reason was the 10 per cent differential in our shipping expense.

Q. Did you from the period January 1, 1947

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

through most of the year 1947 enjoy a 6 cent maximum on shipments from British Columbia?

A. I am not too clear on when the adjustment was made. As I understand it, it was originally 20 per cent. As I understand it, the rate was subsequently reduced from a 20 per cent increase to a 6 cent maximum, some time about the third month in 1947.

Q. It was the 10th month.

A. The 10th month?

Q. Yes.

A. Therefore, we did not receive the benefit of it,——

Q. Have the costs of production of peat moss gone up in British Columbia since 1946?

A. They have, like the cost of production of all goods. We estimate that the cost of production is approximately 25 per cent. [22]

Q. How much has the peat moss price increased in British Columbia compared to other costs,—strike that question. Let me rephrase it. Have you increased the price on peat moss since 1946?

A. We have in the case of our own company to the extent of 10 cents per bale.

Q. Did you make any allowance for any of those shipments going East of Chicago?

A. If a shipment goes East of Chicago, I presume you mean those having freight rates above the 86 cent zone?

Q. That is correct.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Andrew B. Strang.)

A. Where there is a jump of 12 cents, we reduced the rate of our bale 10 cents a bale in order to have the product, in the zone of higher freight rates, something like the price of our competitor.

Q. Going back to 1947 when the 6 cent maximum was applicable on Eastern shipments, while the full 20 per cent was applicable on shipments from British Columbia, would the full surcharge on the Eastern shipments to a full 20 per cent, depending on the zone in lieu of the maximum, have assisted your company? A. Certainly.

Q. Will you explain for the record how it would have done so?

A. As I previously stated, we had to contend with a discrepancy of almost 10 cents per bale as long as the rates were increased on the Eastern States, by an eight cent maximum, and on the [23] Western areas by a 20 per cent flat increase; the differential there would, of course, have to be reflected in our profits.

Exam. Hall: Well, what territory are you speaking of? You are using, interchangeably, various phrases; you at one time say six cents and at another time you say eight cents, and then you use the term 20 per cent. What does the six cent maximum apply on, per hundred pounds, per bale, or what?

Mr. Tolan: I think I can identify it this way, Mr. Examiner. When the increase of Ex Parte 162

Plaintiffs' Exhibit No. 2—(Continued)

Testimony of Andrew B. Strang.)

was published on January 1, 1947, the rates were set up this way:—

Mr. Tjossem: I think the witness should testify.

Exam. Hall: I think so, too.

The Witness: As I understand it, when the rates were originally set up, peat moss being produced in smaller volume in the Eastern states and not having quite the prominence in the movement, was automatically classed as a fertilizer. That is as I understand it. In the Western states, being so close to British Columbia where a larger percentage of the peat moss is produced in Canada, the volume of traffic was much heavier and, as such, much more noticeable, and, consequently, it received special attention and it was granted a straight increase of 20 per cent, which, of course, is in comparison with the six cent maximum in the Eastern states and the 20 per cent increase on the Western.

Exam. Hall: I don't desire to lead you into a rate situation, if you are not thoroughly familiar with the rates; but I would like to ask you if you know whether this six cent maximum that you speak of was applied to what we call a through overhead rate as distinguished from a combination rate?

The Witness: I am not familiar enough with that.

Mr. Tolan: There will be testimony on that later, Mr. Examiner.

Exam. Hall: All right; go ahead.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

Q. (By Mr. Tolan): Did you sell all the peat which your Company produced during the year 1946? A. No, we did not.

Q. The year 1946?

A. Oh, yes; in 1946, we did.

Q. Did you sell all of the peat that you produced in the year 1947?

A. We carried a stockpile which varied, roughly, a few thousand bales; 9 to 10 thousand bales.

Q. Why is that carry-over considered an excessive amount?

Mr. Tjossem: Just a moment. I object to that as a leading question. The witness has not said that it was an excessive amount, and counsel is putting the words in the mouth of the witness.

Mr. Tolan: I will withdraw the question. I will rephrase it. [25]

Q. (By Mr. Tolan): What was the opinion of your Company in regard to the carry-over?

Mr. Tjossem: I'll object to that. If he has an opinion of his own, he can give it. If it is understood he is testifying and giving his own opinion, then I have no objection.

Q. (By Mr. Tolan): In your opinion, what do you think of that carry-over of production?

A. Well, possibly, the whole picture will become a little more evident and clear when you understand the production of the Company. As I said before, we have a hydraulic operation; we are not dependent upon the time or the weather for our

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

production and, as such, we can adjust ourselves to meet the demands of the trade. Nevertheless, during the year 1947 we did carry forward a stockpile of, roughly, 9 to 10 thousand bales of a value of approximately \$15,000, which, despite the fact that we had shut down for a period of two or three weeks during the summer months when the demand for the supply was falling off, we, nevertheless, in spite of the adjustments, still carried forward the stockpile.

Exam. Hall: Off the record.

(Discussion off the record.)

Q. (By Mr. Tolan): Are you presently making a discount in price on shipments going East of the Chicago area? A. Yes, we are.

Q. And what is the purpose of that discount?

A. As previously stated, because of the freight rate, and in order to get into those zones we had to make some reductions.

Mr. Tolan: That's all.

Exam. Hall: You may cross examine.

Cross Examination

Q. (By Mr. Tjossem): You say that you are presently making a discount of 10 cents a bale in the movement beyond the Chicago zone?

A. Yes.

Q. And you say that is because of the excessive freight rates? A. Yes.

Q. What freight rates?

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Andrew B. Strang.)

A. At the present time, Zone A, \$1.04; Zone B, \$1.01; Zone C, \$.98.

Exam. Hall: Are those the transcontinental group?

The Witness: I think they are.

Exam. Hall: That sounds like it.

Mr. Tolan: They are, sir.

The Witness: Zone D, \$.86. That is for a bale.

Q. (By Mr. Tjossem): When you use the word "excessive," what do you mean by that?

A. I refer to the large increase or discrepancy between 86 cents and 98 cents.

Q. Your testimony is that you referred to all the groups in the 86 cent zone and anything in [27] excess of that would then be excessive?

A. I didn't imply that.

Q. What did you imply?

A. I implied that the freight burden upon us by shipping into that zone, as compared with the Eastern producers shipping into similar zones, placed us at a disadvantage.

Q. Are you familiar with the number of miles your commodity travels in reaching the zones beyond Chicago? A. I am.

Q. How far is it?

A. Do you want that in mileage?

Q. Just as a rough approximation?

A. Well, I suppose my guess is as good as anybody else's.

Plaintiffs' Exhibit No. 2—(Continued)

Testimony of Andrew B. Strang.)

Q. You said you knew, and that is why I asked you the question. What is your knowledge of what the distance is?

A. Let me call it 3500 miles.

Q. In that area you are in competition with what producers?

A. We have to contend with competition, as I stated before, from the producers of peat moss in Maine, the Eastern provinces of Canada, and the other products such as ground corn cobs, sugar cane husks, sugar cane refuse, and various other competing products.

Q. Now, have you any knowledge as to how far distant the producers in Eastern Canada are from the markets that you are trying to reach East of Chicago? [28]

A. In the light of the last question, I don't think that is quite as far.

Q. What is your idea of how far it is?

A. I would not hazard a guess, except to say that I imagine it would be, roughly, 1000 miles.

Q. As compared with 3500 miles on your transportation? A. Yes.

Q. That would be approximately the same distance from the Maine producers?

A. I beg your pardon?

Q. Is that the distance of the Maine producers from the area that you are talking about?

A. You must realize, of course, that you have several sources of competing commodities going into

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

the territory; there are, first of all, the Eastern provinces of Canada, the Southern states in the United States, and the Province of Ontario.

Q. You mean that you are trying to reach the Eastern Seaboard? In these rate groups that you gave, ranging from \$1.04 to 98 cents, would those rates allow you to reach, for example, the market in New York City? A. \$1.04, you mean?

Q. Yes? A. It does at the present time.

Q. In other words, you can reach New York today from your plant in British Columbia on a \$1.04 rate? [29]

A. It is not a case of being able to reach the State of New York. As I understand it, to ship to New York we pay the freight rate of \$1.04.

Q. You are doing that today? A. Yes.

Q. You are doing that to meet the competition with the Maine producer, who is also selling in New York State?

A. We are meeting competition only by making adjustments.

Q. And that adjustment, as I understand it, is the price of 10 cents lower in New York, for example, than you are getting in the Chicago area?

A. That adjustment, as I mentioned, was 10 cents a bale in those zones having freight rates above 85 cents,—that is not the only adjustment we make.

Q. As you approach the Eastern Seaboard, do you make a greater adjustment?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

A. That is the case generally.

Q. You mean a 10-cent adjustment for the area East of Chicago which, I understand now, increases as you come to the Eastern Seaboard? Do you mean to say that 10 cents a bale as an adjustment is not the final adjustment?

A. I understand we have to make a greater adjustment.

Q. You mean that you receive a return of 10 cents less, or is it a difference in the price to the consumer of 10 cents less in the Eastern zones, [30] Chicago as compared with the prices in the Eastern zones?

A. We sell it at a discount of 10 cents a bale in this area, as I previously outlined. As such, the Company realizes from the sale to the customer 10 cents less.

Q. What is the current price per bale in the Chicago area?

A. That is in the 86-cent territory?

Q. Are you quoting a selling price, less freight, in that area?

A. It would be \$1.85, plus 86 cents.

Q. What are you getting for it in New York State?

A. It would be \$1.75, which would be a discount of 10 cents, plus a freight rate of \$1.04.

Q. Do you quote all your prices delivered, f.o.b. destination? A. We do.

Q. Who pays the freight?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

A. The Company prepays the freight.

Q. Do your consignees understand that they must reimburse you for the freight that you pay?

A. The price is f.o.b. at the consignee's point.

Q. So that today, for example, in quoting New York, you take your base price of \$1.75, and you multiply the weight of the bale, in accordance with its weight per hundred pounds, adding thereto a rate of \$1.04, and then you arrive at the price f.o.b. destination?

A. You must realize that these bales are made at [31] our sales agency, and they are our outlets; and, as such, those prices which Atkins and Durbrow sell those bales in Vancouver,—they have to be adjusted 10 cents a bale less on account of the fact that they are going to New York.

Q. What price would your sales agency today quote a New York buyer of peat moss per bale?

A. \$3.21, I think, is the average.

Q. \$3.23? A. I beg your pardon. \$3.03.

Q. Now, what price per bale are you quoting today in Chicago?

Exam. Hall: He said it was \$1.85 plus 86 cents.

The Witness: I think now he refers to the price to the consumer in Chicago.

Q. (By Mr. Tjossem): That is correct. What is the price that you are quoting today on peat moss?

A. Well, it would be roughly, 26 cents less, I would say.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

Q. And that difference between the Chicago price and the New York price reflects a 10-cent greater base price, plus the freight rate?

A. Yes.

Q. So, in selling in Chicago, you have increased the price of the price of the peat moss 10 cents per bale above New York?

A. We haven't increased it; we have made the reduction for New York.

Q. Well, that is what your Company gets? 10 [32] cents less for the bale sold to New York?

A. Yes.

Q. Do you have any knowledge with respect to the competing producers in the region?

A. I am not in a position to say.

Mr. Tolan: I will have a witness who will testify to that.

Q. (By Mr. Tjossem): What, if any, has been the increase in the price per bale of peat moss in your Company, at the present time, as compared with the price in 1935?

A. There is very little relationship one between the other. As a matter of fact, it has been previously stated by the witness representing the sales outlet that the price is much greater; in fact, it is almost doubled. Personally, I am not acquainted with the sales price in 1935.

Q. How long did you say you had been with the Company?

A. Two and one-half years.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Andrew B. Strang.)

Q. Were you with any other peat producer up there prior to that? A. No.

Q. What, if any, has been the increase in the peat moss price within your recollection, within the last two years?

A. I have previously outlined that; 10 cents per bale.

Q. Actually there has been no increase in the last two and one-half years except the 10 cents per bale? A. That is right. [33]

Q. Are you familiar with the complaint that is filed in this action? A. I think so.

Q. Are you familiar with the cars set forth in Appendix A to the complaint?

A. No; I have not paid much attention.

Q. Have you seen Appendix A?

A. No; I have not prior to this.

Q. You testified as to the percentage of production in your Company compared to the total production of peat moss in the British Columbia area?

A. I will say that Atkins and Durbrow, Ltd., produce, roughly, 17 to 20 per cent of the peat moss produced in British Columbia; roughly, one-fifth.

Q. Is that true with respect to the full two and one-half years that you have worked with the Company, or have they increased their production recently?

A. We have increased our production recently.

Q. Did you increase in 1947 over 1946?

A. We did.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

Q. Did you increase in 1948 over 1947?

A. No, we have not.

Q. What would be your relative increase in 1947 compared to 1946?

A. I would roughly estimate 50,000 bales. [34]

Q. And your total production in the year 1946 was what?

A. I cannot give you the figures for 1946.

Q. Well, approximately?

A. Well, let us say an increase of 50,000 bales in 1947.

Q. What was the 1947 production?

A. 250,000.

Q. As I understand your testimony, it is that in the year 1946 you had no carry-over going into 1947; is that correct? A. Yes.

Q. And then with this increased production of 50,000 bales, you had a carry-over of from 9 to 10 thousand bales?

A. I should possibly qualify that to say that there were roughly, 1500 bales, which is the normal month's end stockpile.

Q. You would call that a normal carryover?

A. At the end of the month, yes.

Q. With the production of 250,000 bales in the year 1947, you had a carry-over of 10,000 bales in that year? A. Yes.

Q. Now, you mentioned that in 1947 you encountered difficulty in reaching the territory that you define as the Eastern market, and I am going to

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

accept your definition as being the Eastern Seaboard, the Middle East and Central States. The difficulty that you mentioned, was that which you encountered in the 86 cent rate group; is that correct? [35]

A. The 86 cent rate, I think—well, let me put it this way, that the increase being based on a percentage basis didn't affect the 86-cent zone to the extent that it did the other Eastern zones which already had a higher freight rate.

Q. I think that is a matter of arithmetic; we all know that. I will ask you where you encountered difficulty in 1947; did you encounter difficulty in the 86-cent group destinations?

A. I stated that the greatest percentage of our sales was in the Eastern states where the freight rate is higher, and it adds to the cost of the bale, and where you get into the position of the Eastern producers, you are working at a disadvantage.

Mr. Tjossem: I ask that the answer be stricken.

Emax. Hall: Read that question, Mr. Nelson, please.

(Last question read.)

A. Yes.

Q. (By Mr. Tjossem): Did you encounter some difficulty in 1947 in those zones lying East of the 86-cent group? A. Yes.

Q. When did you first encounter that difficulty?

A. Well, the increases, as I recall, were late in the Fall of 1946. As in all cases where one is sell-

Plaintiffs' Exhibit No. 2—(Continued)

Testimony of Andrew B. Strang.)

ing, it takes some time for the public to react to the increase in prices, but very definitely during the summer and early spring of 1947 we began to notice the discrepancy between our price and those [36] prices of the Eastern producers.

Q. All right. Will you give me the month when you discovered this?

A. I am not in a position to say.

Q. Would you say it was around the month of May 1947?

A. You can call it December, or any month; I don't know.

Q. It was during the spring or early summer?

A. That is correct.

Q. How long has that difficulty continued?

A. It has become evermore increasingly apparent as the increases continue to come along.

Q. You say it is more difficult to sell in those markets, or was more difficult to sell in those markets in May of 1948 than it was in May of 1947, for instance?

A. Yes.

Exam. Hall: Let me understand what the point is here.

When did this general increase become effective?

Mr. Tolan: January 1, 1947.

Exam. Hall: Could you take a typical rate from British Columbia to a typical destination in this Eastern area and give it to me in cents per hundred pounds, or per bale, or whatever way it is applied, on December 31, 1946?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

Mr. Tjossem: We will have an exhibit which will give you the entire pattern of the rate.

Exam. Hall: All right. How did you arrive at [37] the 10-cent concession, or whatever you call it? How did you determine it should be 10 cents, or not 12 cents or 14 cents, or something else? How did you select 10 cents?

The Witness: I think the decision of making a discount of 10 cents when bales were sold in those zones was based on the fact that the Eastern producers were generally underselling us by about 10 cents a bale.

Exam. Hall: By the term "Eastern producers," you are taking in a lot of territory. May I ask you, please, whom you consider as the seller who controlled the price? Who made the price, if I may use that term, let us say, in the Eastern territory?

The Witness: Those peat producers shipping from Maine, the Eastern provinces of Canada and the Province of Ontario.

Exam. Hall: And those are the shippers that you considered as making the price?

The Witness: Yes.

Exam. Hall: What freight rates do they pay? Do you know that?

The Witness: No, I don't.

Mr. Tolan: There is an exhibit on that.

Exam. Hall: Of course, you will realize that from Maine to any place in the State of New York,

Plaintiffs' Exhibit No. 2—(Continued)

Testimony of Andrew B. Strang.)

he haul would be considerably less than from British Columbia to New York?

The Witness: We do, sir. [38]

Exam. Hall: And the freight rate naturally would be a whole lot less?

The Witness: Yes.

Exam. Hall: I am a little bit confused as to why this 10 cents comes into the picture, and how it comes into the picture is still not clear to me.

The Witness: Well, may I try once more? When we sell to those zones, the D and E zones, we sell at \$1.85 a bale.

Exam. Hall: Who makes that price?

The Witness: That is our price.

Exam. Hall: \$1.85 a bale. Where is that. F.O.B.?

The Witness: That is F.O.B. Vancouver.

Exam. Hall: All right.

The Witness: Then when we sell to points in Zones A, B, and C,—

Exam. Hall: Let us take Pittsburgh. That would be in Zone A?

Mr. Tolan: Well, let's see,—

Exam. Hall: All right. Let us take Harrisburg. That would be Zone A.

The Witness: \$1.04. When we sell to that zone, we sell at \$1.75; in other words, we knock 10 cents off a bale?

Exam. Hall: Why do you do that?

The Witness: Because of the freight on that bale at that point would be higher than \$1.00,—

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Andrew B. Strang.)

Exam. Hall: Higher than \$1.00?

The Witness: Let us say this; that the bale laid down at that plant is going to cost more than it is going to cost at a plant having an 86 cent zone rate.

Exam. Hall: It is obvious there would be a freight difference between 86 cents and \$1.04, which would be 18 cents. Why don't you make it 18 cents?

The Witness: You mean why didn't we reduce our price 18 cents?

Exam. Hall: Yes.

The Witness: The story is all in the financial picture of the Company.

Exam. Hall: And still I am probably not making myself clear. I am wondering, trying to get the thing straight in my mind, just what the picture is. You have stated that Maine, for example if a shipper in Maine, or a producer in Maine ships to Harrisburg, Pennsylvania, would that be done?

The Witness: Yes.

Exam. Hall: Would he ship the same kind of a product?

The Witness: It would be, almost.

Exam. Hall: Would it be as attractive to the purchaser as your product?

The Witness: We always maintain that the best peat moss comes from British Columbia, but so far as the individual is concerned, it is purely a matter of opinion or choice. [40]

Exam. Hall: Would he pay more for your product than he would for the Maine product?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

The Witness: Yes, he would.

Exam. Hall: Have you some origin point in Maine that you could use?

The Witness: No, I have not.

Exam. Hall: Does anyone?

Mr. Tolan: The Maine shipping point would be Cherrydale; that would be one; I think the principal shipping point is Columbia Falls, Maine; that is the Maine shipping point.

Exam. Hall: All right; Columbia Falls, Maine. Do you happen to know what the freight rate from Columbia Falls, Maine, to Harrisburg is?

Mr. Tolan: I can make it available. It is 36 cents published basic.

Exam. Hall. All right. That is from Columbia Falls, Maine, to Philadelphia?

Mr. Tolan: And the basic rate from British Columbia would be 90 cents at the same time.

Exam. Hall: There is a difference of 54 cents in freight rate that the man from British Columbia has to pay as against the man from Columbia Falls, Maine, who produces peat. Would that be so much a bale as compared with the man in British Columbia?

Mr. Tjossem: That would be in cents per [41] hundred pounds; you are talking in terms of bales, and I think that should be corrected.

Exam. Hall: How are the rates published?

Mr. Tolan: In cents per hundred pounds.

Exam. Hall: What is the weight of a bale?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

Mr. Tjossem: I do not have it.

The Witness: 115 pounds is our average weight.

Exam. Hall: Would that be the same average weight from Columbia Falls, Maine?

The Witness: Yes, they generally produce the same size bale.

Exam. Hall: So, using 100 pounds as the net weight, the man in Columbia Falls, Maine, would have an advantage of 54 cents in freight rate, with which you have to compete?

The Witness: That is right.

Exam. Hall: How do you do that?

The Witness: We discount our bale 10 cents when we sell it in that area.

Exam. Hall: Well, considering the freight rates alone, it still leaves the man in Maine with an advantage of 46 cents?

The Witness: And then, again, we assume approximately 7 cents of the freight account by shipping a bale, which actually weighs about 115 pounds; it has a guaranteed weight of 105 pounds. In short, we have a maximum weight per bale, [42] which is added to the cost of the bale in this area, and the discrepancy of 10 cents a pound is assumed in the,—the discrepancy of 10 cents a bale is assumed in the price F.O.B. British Columbia, and the overcharge on the extra poundage over 100 is assumed.

Exam. Hall: You are getting over my head on

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

that. Going back to your 86 cent zone; that would be Chicago, Group D?

The Witness: Yes.

Exam. Hall: You don't find it necessary to make a 10-cent concession there?

The Witness: That is correct.

Exam. Hall: Why is that? Wouldn't the shipper from Columbia Falls, Maine, to Chicago have a lower freight rate than from Vancouver to Chicago? Lower by more than 10 cents a hundred pounds?

The Witness: I would think he would.

Exam. Hall: Then why don't you make the same amount of concession there at Chicago?

The Witness: I would assume that the majority of the Eastern peat producers market their products relatively close to the locality where the peat is produced.

Exam. Hall: Is it possible that they could ship their product over the Lakes down the St. Lawrence?

The Witness: Personally I doubt it; I know very little about it, but I don't think any of that moves down the Great Lakes. [43]

Exam. Hall: It is a rail commodity?

The Witness: I think so.

Exam. Hall: Entirely?

The Witness: I think so.

Exam. Hall: I have no further questions. I suppose I will have a few later on.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Andrew B. Strang.)

Q. (By Mr. Tjossem): What price do you make for the Pacific Northwest, at Seattle, for instance?

A. \$1.85, plus freight.

Q. And this \$1.85 basis, plus the freight to get it there, does that also apply to all points in the Pacific Northwest and into California?

A. That is the general policy.

Q. That is what the policy is? A. Yes.

Q. And I think maybe I overlooked asking you to explain a little bit further your present policy of making discounts East of Chicago. As I recall, you said, as you approached the Eastern Seaboard at the present time you are increasingly making reductions in the base price to amounts greater than 10 cents per bale?

A. That premise is incorrect, partly because I was not sufficiently clear. As soon as the shipments in question go into an area having a freight rate [44] in excess of 86 cents, it is a 10 cent discount per bale on it. There is no distinction made between Zones A, B and C; it is simply a straight discount of 10 cents a bale where the freight rate is above 86 cents.

Q. In other words, it is your testimony now as sales in the United States, you have two prices: One which is \$1.75 per bale plus freight to destination, and the other is \$1.85 a bale plus freight to destination? A. That is correct.

Exam. Hall: Again, if I may ask, suppose a shipment went to Fort Wayne, Indiana, or South

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

Bend, just East of Chicago; would you allow the 10 cents to that station?

The Witness: May I ask what zone that would be?

Exam. Hall: That would be just directly East of Chicago, and I think it would be in Zone C.

Mr. Tolan: 98 cents.

The Witness: Then the bale would carry a 10 cent discount.

Exam. Hall: It would carry a 10 cent discount?

The Witness: Yes.

Exam. Hall: And there is a 12 cent spread in the rates?

The Witness: That is right.

Q. (By Mr. Tjossem): Were you here this morning and did you hear Mr. Pittack testify, from VanWaters and Rogers? A. I was.

Q. Do you sell anything to that Company?

A. We do not. [45]

Mr. Tjossem: That is all I have.

Redirect Examination

Q. (By Mr. Tolan): Are you contending in your testimony here that the rate from Columbia Falls, Maine to Harriburg, talking of basic rates, should be the same as from British Columbia to Harrisburg? A. No, we are not.

Q. So far as the 10 cent allowance is concerned, was that allowance based on the difference in your

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

base rates or was this allowance based in the difference of the surcharge of the base rates?

A. It was based on the discrepancy on the maximum charge and the percentage increase.

Exam. Hall: Can you illustrate that as to one specific illustration?

The Witness: One shipment in particular?

Exam. Hall: Take what I have been using, Vancouver to Harrisburg or Philadelphia versus British Columbia to Harrisburg or Philadelphia.

Mr. Tjossem: I would like to ask what you mean by surcharge?

Mr. Tolan: Any charges over and above the base rate in effect on December 1, 1946.

Exam. Hall: The witness is evidently not conversant with the details of the freight rates. For [46] the purpose of answering my question, someone here might be able to give those freight rates from Columbia Falls, Maine, to Philadelphia?

Mr. Tolan: This rate for 1946 was 36 cents, and the rate from New Westminster to Philadelphia was 90 cents.

Exam. Hall: That was in 1946?

Mr. Tolan: Yes.

Exam. Hall: How does this surcharge come in? What increase did the 36 cent rate take on January 1, 1947, and what increase did the 90 cent rate taken on January 1, 1947?

Mr. Tjossem: Might I just state, he says he has worked for the Company two and one-half

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

years,—is it not true that this surcharge of 10 cents a bale for the zones East of Chicago, or beyond the Chicago group, were in effect all the time you were working with the Company?

The Witness: I would say, speaking purely from memory, that that 10 cent zone discount was an innovation in the winter of 1946-1947.

Q. (By Mr. Tolan): When in 1946?

A. 1946 and 1947.

Q. Or 1947?

A. It is not too clear in my mind, but I am pretty sure that that 10 cent arrangement was worked out in the winter of 1946-1947.

Q. You mean in the latter part of 1946 or early part of 1947? A. That is correct. [47]

Exam. Hall: Well, now, I am going to get back to my question. I don't want to leave the record open the way it is. As we left it, the rates were 36 cents versus 90 cents as the base rate. Now, I asked you what increase was applied on the 36 cent rate in cents per hundred pounds and what increase was applied on the 90 cent rate?

Mr. Tolan: The 36 cent rate went up 6 cents, and the 90 cent rate went up 18 cents.

Mr. Tjossem: I think you should state how long that continued.

Mr. Tolan: Until December 1, 1947.

Exam. Hall: Now, are you contending that the 90 cent rate should have only gone up 6 cents?

Mr. Tolan: That is correct; exactly.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Andrew B. Strang.)

Q. (By Mr. Tjossem): Would you indicate more particularly what increase was applied on the New Westminster - Philadelphia rate as compared with the Maine rate to Philadelphia? Which adjustment of the basic rate became effective December 1, 1947?

Mr. Tolan: I just gave that. It went up 18 cents from 90 cents.

Mr. Tjossem: I am talking about the charge you mentioned, or the change you mentioned on December 1, 1947.

Mr. Tolan: On December 1st the 6 cent maximum was made applicable; it took from January 1st to December 1st to get that adjustment made in the six cent assessment on that rate. [48]

Exam. Hall: I think I have that straight.

Mr. Tjossem: I have no further questions.

Exam. Hall: Have you any further questions, Mr. Tolan?

Mr. Tolan: No, sir.

Exam. Hall: You are excused.

(Witness excused.)

Mr. Tolan: I will take the stand myself because I have several exhibits I want to introduce.

FRED H. TOLAN
was sworn and testified as follows:

Direct Statement

The Witness: My name is Fred H. Tolan; I am traffic consultant and traffic manager. My office is

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

1103 Smith Tower, Seattle, Washington.

For the record, I would like to identify this exhibit as Complainant's Exhibit No. 1, which will be offered in evidence, with others.

Exam. Hall: The exhibit will be marked No. 1, Witness Tolan.

(Complainant's Exhibit No. 1, Witness Tolan, marked for identification.)

The Witness: This exhibit shows, in general, the complete scope of the complaint; first, the number of cars involved, 1268; it shows the actual weight of each car, average, 38,182 pounds; it shows the most important shipping point is New Westminster, British Columbia; it shows the shortline mileages [49] to the most important points in California, the two which received the greatest number of shipments being given in Paragraph 4, and the actual route mileage used, in Paragraph 4. The actual mileage has been used rather than a short or trick mileage to give key distances into the Middlewestern area.

Turning to Page 2 of this exhibit, to Paragraph 6, that gives the actual average mileage into the Midwest from New Westminster, British Columbia, using Chicago, St. Louis and Des Moines as the key centers, which gives 2239 miles.

Paragraph 7 takes the basic rate and computes the average actual per car earnings; Paragraph (B) of Section 7 takes the average earnings on the 6 cent maximum increase, and Paragraph (C) takes

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

the per car earnings on the basic rate plus 20 per cent enhancement on the actual average load of 38,182 pounds, which shows an earning of \$328.36, which was assessed on the Western movement from January 1, 1947 to December 1, 1947.

Paragraph 8 shows the per mile earnings on the basic rate and on the rate sought herein, the 6 cent maximum; Paragraph 9 compares those earnings with the minimum earnings prescribed in the matter listed there under Paragraph 9.

Exam. Hall: Mr. Tolan, when the 6 cent increase was cancelled, and a 25 per cent, or a 20 per cent increase applied to this traffic, did you seek suspension of that change?

The Witness: I am sorry, it did not come up [50] that way. The rates were published with a fertilizer increase of 6 cents; later we found out, sometime, some considerable time after the shipments had begun to move, that the 6 cent maximum was not being protested, and that, instead, the full 20 per cent was being assessed on peat moss shipments out of British Columbia. Therefore the matter didn't come to our attention until, it was actually nearly three months,—it was nearly three months before we found that the 20 per cent was being assessed rather than the 6 cents.

Exam. Hall: Before Mr. Strang left the stand, I got the impression that it was conceded, or that someone stated that for about two months in late 1946, or early 1947, the six cent rate had been ap-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

plied for about a month, and then that was cancelled?

The Witness: No. Base rates were increased to a flat 20 per cent rate from January 1st.

Exam. Hall: Do you recall that conversation right about the close of Mr. Strang's testimony?

The Witness: I heard him mention the date of December 1, 1947.

Exam. Hall: Well, on December 1, 1947, was there a general percentage increase applied to the rate from Vancouver or New Westminster?

The Witness: On December 1, 1947 into the Middlewestern area there was a decrease—not an [51] increase. The 20 per cent surcharge which had been assessed up until that time was replaced with a six cent maximum.

Exam. Hall: On December 1, 1947?

The Witness: That is right.

Exam. Hall: Now, on January 1, 1947, was that the date the general increase became effective?

The Witness: That's right.

Exam. Hall: And from January 1, 1947 to December 1, 1947, from New Westminster to the territory West of Chicago, did you or did you not have a six cent maximum increase applied?

The Witness: We did not have the six cent maximum from January 1 to December 1 of 1947.

Exam. Hall: You had the 20 per cent?

The Witness: Yes.

Exam. Hall: Then on December 1, 1947, you

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

got a six cent maximum increase from December 1?

The Witness: To December 1, 1947,—would you read that, Mr. Reporter?

Exam. Hall: What I am after, when did you get the six cent maximum increase applied to this traffic? When did you first get it?

The Witness: May I ask that that question be withheld for a moment, and I have another exhibit here which I think will eliminate all the questions that you have suggested.

May I identify this as Complainant's No. 2? [52]

Exam. Hall: It will be marked as Complainant's 2, Witness Tolan.

(Complainant's Exhibit No. 2, Witness Tolan, marked for identification.)

The Witness: This is a breakdown of the 1268 cars, by territories. We had to break it down by territories because of the rate changes involved in this matter were by territories. Taking the territory in Section 1 of this exhibit of groups A, B and C,—all of them East of Chicago. Incidentally, the allocation of cars by states are given above the rates, and directly under the caption of Paragraph (1); there were 138 cars, or 11% of the total number of cars involved in this case, which went into Official Territory. The basic rates A, B, and C are given in the first column, 90 cents, 87 cents, and 84 cents.

On January 1, the carriers assessed a full 20 per cent increase on the 90 cent rate, making it

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

\$1.08. On October 13, 1947, the Commission gave its first order in the second round of rate increases, Ex Parte 166, so that \$1.08 was subject to an additional 10 per cent surcharge; that brought the rate up to \$1.188, to Group A. On January 5, 1948, the 10% surcharge on the rate, which became effective on October 13, was cancelled, and in lieu of that 10%, the rate of \$1.08 was subject to a 20% surcharge; that was the second supplemental order in the second round of rate increases. That [53] brought the rate up to \$1.296.

On February 1, 1948, the Eastern carriers finally concurred in the six cent maximum on British Columbia produced peat, and the rate on February 1st became 90 cents plus a 6 cent maximum, which became published at 96 cents, plus a 20% surcharge which went into effect on January 5. The total of those brought the rate up to \$1.152; and then on May 6 of this year, the Interstate Commerce Commission granted that 6 cent maximum on fertilizer, and the carriers voluntarily, on short notice, made the 8 cent maximum applicable on peat by tariff publication. So in May of this year the rate became \$1.04. I would like to direct the attention of the Examiner particularly to the fact that today the \$1.04 rate is substantially less than the rate that was charged during the year 1947, in spite of the other increases that have gone into railroad rate making.

I would like to emphasize one thing under Para-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

graph (1); the 6 cent maximum into Eastern territory did not go into effect until February 1, 1948.

Exam. Hall: Well now, you spoke of a 6 cent maximum. Taking your Paragraph (1) of Exhibit 2 and applying that to Group A. Considering only the Group A by itself, the basic rate was 90 cents?

The Witness: That's right.

Exam. Hall: Prior to January 1, 1947? [54]

The Witness: That's right.

Exam. Hall: Now, on that date, effective January 1, 1947, something went into effect to Chicago, and apparently from this exhibit it was 18 cents increase, — a 20% increase, — pardon me; into Group A?

The Witness: That is right.

Exam. Hall: Now, was that 18 cent increase effective by a so-called master tariff?

The Witness: It was.

Exam. Hall: And that was a 20% increase?

The Witness: Yes.

Exam. Hall: Now, you come to October 13, 1947, and apparently you add onto that another increase of 10.8 cents?

The Witness: 10%; it was 10% of a \$1.08 rate.

Exam. Hall: Well now, let me ask you, on January 1, 1947, this 20% increase, was that a temporary increase or was it a permanent increase?

The Witness: It was a nationwide, permanent increase. It was incorporated in the rate structure at that time; it was not temporary.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

Exam. Hall: It was by order of the Commission?

The Witness: In Ex Parte 162.

Exam. Hall: Now, on October 13, 1947, what was the authority for that increase?

The Witness: That was the first temporary order in Ex Parte 166. [55]

Exam. Hall: Then on January 5, 1948, they got a further increase?

The Witness: That was a temporary order; that is the second supplemental order.

Exam. Hall: Both temporary orders?

The Witness: Yes.

Exam. Hall: And then on February 1, 1948, you got a reduction, apparently?

The Witness: On February 1, 1948, the tariff was changed,—the basic published rate was changed to read not 90 cents, but was published to read 96 cents, not subject to Ex Parte 162, which knocked out the 20% increase.

Exam. Hall: In February 1948, did that occur as an order of the Commission?

The Witness: No; that occurred as an action of the Standing Rate Committee at Chicago in response to a plea by myself for the Complainants in this case.

Exam. Hall: You referred to a maximum increase in that rate of,——

The Witness: Six cents.

Exam. Hall: Over what?

The Witness: Over the 90 cent rate in effect

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

prior to January 1, 1947. Those rates were subject to the still outstanding orders in Ex Parte 166, [56] and therefore that 96 cent rate was subject to a 20% surcharge under the second supplemental order in Ex Parte 166 issued in January 1948.

Exam. Hall: January 5, 1947?

The Witness: January 1, 1947.

Exam. Hall: That was in Ex Parte 162?

The Witness: 162 was January 1, 1947.

Exam. Hall: Your contention centers around 162 rather than 166?

The Witness: That is right. Everything in this application is directed to 162. 166 has to come in incidental to 162. All of this case is addressed to 162.

Exam. Hall: Now, if I should take 90 cents on Group A on January 1, 1947, what is it that you contend should have been added to that?

The Witness: Six cents.

Exam. Hall: Six cents?

The Witness: That is correct.

Exam. Hall: And then you plus that by the 20% or whatever increases were authorized in 162?

The Witness: Yes.

Exam. Hall: And you finally get what?

The Witness: The rate you get, with the 90 plus 6 plus 8; we don't want it changed in the present rate.

Exam. Hall: That is the rate that was published May 6, 1948? [57]

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

The Witness: May 6, 1948; that is correct. I want to direct the Examiner's attention particularly to the fact that it was not until February 1, 1948 that the six cent maximum was incorporated into the tariff. That is an important date to remember.

Turning then to Section 2 of this exhibit, we have a shipment into Southern territory, and there there is the extremely small amount of traffic, only 29 cars, 2% of the total. The base rate published effective on December 31 is shown there, taking the C territory South of the Ohio River, 84 cents.

Exam. Hall: Well now, without going into a detailed discussion of that exhibit, does the same situation apply there as you have said was applicable to Official Territory, except the rates differ?

The Witness: There is one other basic point. The six cent maximum was not incorporated into the rate structure until March 29, 1948. You will recall it was February 1, 1948. In the Southern territory it was not until March 29, 1948.

Exam. Hall: It took the Southern territory a little longer to make up their minds?

The Witness: The concurrences from the Eastern lines were not made effective; the Southern lines never did change their tariffs to include the six cent maximum. The way the six cent maximum came in was that tariff 162,—the master tariff,—was amended effective March 29, 1948, to provide [58] a six cent maximum. So, as long as the rates

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

were subject to that master tariff, we paid the six cent maximum there, on May 29.

Turning now to Page 2 of the exhibit,—that is Page 2 of Exhibit No. 2,—which is the C-1 area and west to Mountain Pacific Territory,—covering the Midwestern and Southwestern area,—we have a total of 554 cars, which, to the total of all cars, is 44%.

Exam. Hall: That is all shown on the exhibit?

The Witness: Let me emphasize on this exhibit, that it was December 1, 1947 that the six cent maximum was incorporated in the tariff. We paid a full 20% from January 1st until December 1st into the Middlewestern area.

Exam. Hall: And then on December 1st you got the benefit of the six cent maximum that you were claiming?

The Witness: That is right.

Turning to Paragraph (4), which is the Mountain Pacific Territory, or the area west of the Rocky Mountains, including Montana, there were 547 cars in the Mountain Pacific Territory, or a total of 43% of the total.

Now, I would like to introduce an exhibit for identification showing the carloads of peat from British Columbia to California only.

Exam. Hall: That will be Exhibit 3.

(Complainant's Exhibit No. 3, Witness Tolan, marked for identification.) [59]

The Witness: The last paragraph of Exhibit No.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

2 refers to Mountain Pacific Territory. This breaks down the shipments into the largest consuming State in the Mountain Pacific Territory. California received 455 cars. This exhibit shows every one of the towns which received cars, together with the number of cars received, and we follow the same basic procedure that we used in the other exhibits, particularly referring to Exhibit No. 2. The base rates are shown in the column under the heading of "Basic Rate." The 20% increase is shown in Column 2. The 20% increase plus the first temporary order in Column 3, and Column 4 is one of the important columns of this exhibit. On January 1, 1948, the carriers changed the tariff and published new rates not subject to the master tariff of 162. In those new rates they did, at the request of myself and possibly others, include the six cent maximum into Southern Territory, but in the Northern California rates, particularly in the San Francisco Bay area, the new rates as published January 1, 1948, included a full 20% increase.

I want to emphasize that Southern California on January 1, 1948, got the full six cent maximum. The San Francisco Bay area and Northern California, and those points related to that adjustment, were charged the full 20%. One of the aspects of this complaint is for the Commission to order the American carriers to carry the six cent maximum into that territory. [60]

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Fred H. Tolan.)

Exam. Hall: Who published the tariff of the American carriers?

The Witness: The American Carriers, Mr. J. P. Haynes. It is identified on the last page of the exhibit.

Exam. Hall: Now, just take the first item on Exhibit 3, Bakersfield.

The Witness: Right.

Exam. Hall: What is it that you are claiming as reparations on shipments to Bakersfield? What period and what rate?

The Witness: We contend that we should have a rate for the shipments involved, and listed on the complaint,—that we ought to have a rate of 72 cents plus 6 cents, making it 78 cents. Any shipment which moved subsequent to the temporary emergency surcharges would be subject to those surcharges.

Exam. Hall: Amplify that a little further. You have a 72 cent rate shown on there to Bakersfield?

The Witness: That is right.

Exam. Hall: Effective, apparently, December 31, 1946, or that is when it was in effect?

The Witness: That is right.

Exam. Hall: Now, according to your statement you are asking an order requiring the carriers to make reparations down to a basis of 78 cents. What period would that be for?

The Witness: That would be for the period from January 1, 1947, to October 15, 1947. [61]

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Fred H. Tolan.)

Exam. Hall: During that period you want 78 cents instead of 86.4,—94.6 and 86 cents, respectively?

The Witness: That is right.

Exam. Hall: After that, what are you claiming?

The Witness: From October 13 until,—I don't believe there are any shipments after January of this year,—after January 15 we want 78 cents plus 10%.

Exam. Hall: That would be 85.6?

The Witness: That is correct; 85.6.

Mr. Tjossem: Up to what date?

The Witness: Up to December 1, 1947. I don't believe any shipments moved in the year 1948.

Exam. Hall: Now, is it or is it not your position that the Commission's order required the carriers to publish the rates that you are asking?

The Witness: Right. The next exhibit will bring that out.

Mr. Burkett: Suppose some shipment moved to Bakersfield; would you be requesting any different rate after January 1, 1948, rather than 78 cents plus 10%?

The Witness: I think that is irrelevant to the issues, because the rates subsequent to January 1, 1948, are not involved. However, I would answer by saying that we would take whatever the general increases of the Interstate Commerce Commission granted.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

Exam. Hall: Well, the rates are not involved after December [62] 31, 1947?

The Witness: That is right.

Exam. Hall: Would it be true of the whole territory covered by the complaint? Would that be true?

The Witness: That is correct.

Exam. Hall: So that we can forget anything after December 31, 1947?

The Witness: Yes; that is right, because there would be no shipments made which are involved in this complaint.

Exam. Hall: That is, so far as reparations are concerned. How about the situation for the future?

The Witness: Into Northern California, we would only want the Commission's attention directed to 162; we want the six cent maximum. Any increases after that date are adequately taken care of in the present tariff.

Mr. Burkett: Isn't it a fact that in this present proceeding we are not concerned with 166 increases at all?

The Witness: No, with one exception. Any reparations which are granted in this proceeding where the rate is reduced to the six cent maximum, the surcharge under Ex Parte 162 would be on the reduced basis. Aside from that, 166 does not enter into these proceedings at all.

Mr. Burkett: In that case, in the case of the exception to which you referred, there would simply

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

be the applicable 166 increases on the rate including the six cent maximum under [63] 162?

Mr. Tjossem: In other words, if the carriers had applied the six cent maximum when the 162 came down, the case would not be here today?

The Witness: Definitely. I was very surprised that there was an issue on it.

Mr. Tjossem: Then the issue is because the carriers did not, on January 1, 1947, apply the six cent maximum on peat, and until they so applied it; and so far as it has not been applied, that is the complaint that you have against the carriers, solely and completely?

The Witness: With the one exception of the rate into the San Francisco Bay area.

Mr. Tjossem: I think you have outlined that.

The Witness: Even that would not be an issue if the base rate had been left in, because the master tariff 162 was changed to provide a six cent maximum, but by the time the carriers published the page, making it not subject to the master tariff, we were not able in the San Francisco Bay area,——

Exam. Hall: It seems to me, the way you have recited it, the San Francisco carriers will have the burden to explain it; however, it seems to me that something needs justification or explanation as to why the different basis was applied to Southern California than to Northern California. That is separate and apart from the general question of compliance with [64] 162.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Fred H. Tolan.)

Mr. Burkett: All I want to say is that we will present the explanation.

Exam. Hall: I will say this, it will have to be a pretty strong explanation, in my opinion, to convince me that you should have a different basis for Northern California than for Southern California. It just does not seem like sense to me to divide California into two sections.

Mr. Tjossem: In that connection, you must understand that that movement is wholly from British Columbia points.

Exam. Hall: I understand the movement is from British Columbia points, but it is from British Columbia to Southern California as well as to Northern California. I think we could simplify this case a whole lot if we could stick to 162, and have some kind of an understanding that whatever way the Commission goes on 162 will control the question of the increases on 162, because, as Mr. Tolan states, he is seeking nothing after the 166 order came out, provided they had been applied on what he considers a proper 162 increase; is that correct?

The Witness: That is exactly right, and we would so stipulate.

Mr. Tjossem: I think you will find the railroad exhibits are predicated upon 162, and the confusion is the injection by Mr. Tolan of his exhibit on 166. The issues of the complaint, [65] as I understand them, as drawn by the Complainant, in so far as

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

they state a meritorious allegation, are confined to the carriers handling of rate increases in 162.

The Witness: In answer to that, there is no way to avoid bringing in Ex Parte 166, because of the lap-over into the temporary rate order period.

Exam. Hall: Because you had been charged the improper 162 increases compounded by the 166 increases?

The Witness: That is exactly it.

Exam. Hall: And that is why you had to bring it in here?

The Witness: That is right.

Exam. Hall: If the carriers would agree that in the event the Commission should find that they improperly applied the 162 increases, they would go back and apply the 166 increases and recompute the increases for the whole period.

Mr. Tjossem: I think the statements of the Examiner and Mr. Tolan have clarified it. I think we understand it.

Mr. Tolan: Shall I proceed?

Exam. Hall: Yes.

The Witness: I would like to identify for the record another exhibit dealing with the carloads of peat from British Columbia to the Mountain Pacific territory, stating rates in cents per 100 pounds.

Exam. Hall: That will be identified as Complainant's Exhibit No. 4. [66]

(Complainant's Exhibit No. 4, Witness Tolan, marked for identification.)

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

The Witness: On Exhibit 2 we break down the Mountain Pacific Territory and set forth the shipments into the Mountain Pacific Territory. In Exhibit 3 we showed the shipments going into California.

In Exhibit 4 we complete the picture of the Mountain Pacific Territory, and this is one picture that requires a tremendous amount of mental gymnastics to keep up with the rate changes. I would just sketch it briefly for the record.

Exam. Hall: Why do we have to go into all that if the sole and primary question here is the proper application of increases under 162?

The Witness: We will gladly dispense with it, because I believe it adds very little probative value to the record that has not already been brought in directly or by implication with the other exhibits. There is one thing I would like to point out, and that is this, taking, for instance, Phoenix, Arizona; there is a 72 cent rate from New Westminster to Phoenix, which applies equally to New Orleans. On December 1, 1947, that rate from New Westminster to all the Middlewestern and Southwestern Territory became 72 plus six, or 78 cents. However, we could not get the change that we sought in that regard until March 17, 1947, when the 6 cent maximum was included. So we were paying more for hauling it to Phoenix from [67] New Westminster than we were paying for the same to the Southwestern Territory.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

I think no further explanations are necessary. There are no changes in the dates the maximum six cent increase became effective, and I will pass it.

Exam. Hall: You can handle that in your brief.

The Witness: May I identify this next document as Complainant's Exhibit No. 5. It is a statement of pertinent data relative to the 6 cent maximum increase on peat from the Interstate Commerce Commission's Decision in Ex Parte 162.

Exam. Hall: It will be identified as Complainant's 5, Witness Tolan.

(Complainant's Exhibit No. 5, Witness Tolan, marked for identification.)

The Witness: We have alleged that this matter could properly be determined under Section 6, with the proper increase to apply during the entire period under controversy; that is, that it should have been a six cent maximum. The reason we feel that is brought out by Exhibit No. 5. Exhibit No. 5, the first paragraph of it, has a direct quotation from the Order of the Interstate Commerce Commission in Ex Parte 162.

Paragraph 2 lists the authority for the groupings that we use. Paragraph 3,—I would like to call particular attention to Paragraph 3, Appendix 1 to the Order, "Fertilizers, n.o.s, including Potash—Group 640; Diatomaceous or Infusorial [68] Earth—Group 701; Twenty per cent, subject to a maximum of 6 cents per 100 pounds, or \$1.20 per net ton."

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Fred H. Tolan.)

Mr. Tjossem: I do not think it is necessary to burden the record with matters that can be set out in the particular appendix,—

Exam. Hall: That may be all right, and I would not permit a reading of this whole quotation from the Commission's report into the record, but I do want Mr. Tolan to at least make one observation as to what his contention is with respect to that Order. The rates just pointed out, fertilizers, set forth in Group 640; is that correct?

The Witness: That is correct.

Exam. Hall: And that 640 was in the Order?

The Witness: This Paragraph 4 of this exhibit, on Page 2,—I might say the underscoring is all mine.

Mr. Tjossem: I would like to have it understood that that is not testimony. It is a statement of counsel, and, as such, I have no objection to it.

Exam. Hall: He is a witness; he is under oath.

Mr. Tjossem: These are all matters that are reported.

Exam. Hall: I am not talking about the quotation from the Commission's decision.

Mr. Tjossem: Paragraph 3 is also a quotation from the Commission's decision.

Exam. Hall: Well, I know, but I want to get the opinion [69] from the witness as to how they interpret or construe the Commission's decision. That is going to be helpful to me.

Mr. Tjossem: As I understand, what you are

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

asking, is the opinion of counsel on how he interprets the Order. I have no objection if it is understood as such.

Exam. Hall: I realize that the Commission finally will have to determine and interpret its own Order, but the point that I have made here is that, to save me the trouble from reading through the decision and going over a lot of stuff, which I otherwise won't have to read, if I can get a clear statement at this point with respect to the contention of Mr. Tolan, it would be helpful. I think I see it now, and I don't think we need to bother with this exhibit any further.

The Witness: In execution of that Order, I would like to read into the record how the rates were published so that the record will be complete and show the problem of interpretation. In purported compliance with the Commission's Order in 162 the carriers published, Agent Kipp, ICC A3657, Ex Parte 162, Item 107.

Mr. Tjossem: Now, just a moment. I would like to simplify this by asking if phraseology is that of the witness?

The Witness: What is that?

Mr. Tjossem: "Purported compliance of the Order."

The Witness: That was my statement.

Mr. Tjossem: I ask that that be stricken from the testimony. [70] If you will confine your testimony to what you contend the carriers did.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Fred H. Tolan.)

The Witness: Let me state what the carriers did. On January 1, 1947, they published the following:

"Fertilizer and articles listed in tariff making reference to this tariff, as and when taking fertilizer rates, Table 1, apply Table 1 maximum 6 cents per 100 pounds or \$1.20 per net ton."

The interpretation given by the carriers of that item was that as peat was carried in the tariff without a caption of "Fertilizer," it did not thereafter entitle itself to a 6 cent maximum.

Exam. Hall: That is a question of argument.

The Witness: In spite of the fact that the Commission Group,—

Exam. Hall: That is argument.

Mr. Tjossem: That is what I was leading up to.

Exam. Hall: You can argue that in your brief, just as well as trying to get it into the record this way. May I ask if the tariff that you quoted is nationwide?

The Witness: Yes. The next statement I would like to offer is a statement showing the effect of X 162 increases on peat rates.

Exam. Hall: That will be identified as Complainant's 6, Witness Tolan. [71]

(Complainant's Exhibit No. 6, Witness Tolan, marked for identification.)

The Witness: Complainant's Exhibit 6 brings out the net effect of this Order in regard to the competition, and I think it will do a great amount

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

to clarify the testimony of Mr. Strang this morning. Let me go down this exhibit and describe what it says.

Exam. Hall: Don't go down all the exhibit, because it is plain on its face, and anyone can read it; but you might take one typical point.

The Witness: Comparing the first two there; taking the British Columbia shipments to Chicago, Illinois. The base rate is 72 cents, and a 20 per cent increase raised the rate 14 cents; that was an increase of 8 cents over the 6 cent maximum. To Cincinnati, the same procedure was followed, and you can go across to Troy, New York, Philadelphia and St. Louis.

Exam. Hall: That is plain on the exhibit.

The Witness: Now, turn to No. 2, Columbia Falls, Maine, which is a shipping point for the principal peat producing area in Maine. The base rate was given in a tariff authority, and the increase under their surcharge in the East, in Eastern Territory, under Ex Parte 162 was 25 per cent, due to the greater revenue needs of the carriers in that territory. Their increase would have been without the 6 cent maximum, 11 cents. Therefore, their rates were reduced by 5 cents by having the [72] 6 cent maximum. The same theory follows across to all of the principal producing points which are covered by Page 1 of this exhibit.

Page 2 takes a few Manitoba points and compares them with Middlewestern points.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Fred H. Tolan.)

We have asked the Interstate Commerce Commission to prescribe what we think to be the correct rates into the San Francisco Bay area. The rates into California are carried in this one item in the tariff referred to here in the first line of this exhibit, which I would like to identify as Exhibit 7.

Exam. Hall: That will be identified as Complainant's 7, Witness Tolan.

(Complainant's Exhibit No. 7, Witness Tolan, marked for identification.)

The Witness: The first column shows the basic rate as published in the tariff; the second column shows the present rates, and the third column shows what we desire the Commission to prescribe as the through rate on this peat from British Columbia to the California areas involved. Where we have put no change, you will find it to be the Southern California area; they have already included the 6 cent rate maximum in their application. The only rate changes sought in that column, which you will find, are set forth there.

Exam. Hall: Those are points which you refer to as the San Francisco Bay area? [73]

The Witness: Yes.

Exam. Hall: And the other area in Southern California, you have no complaint about that, other than 162?

The Witness: No complaint at all at the present time.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Fred H. Tolan.)

Exam. Hall: No complaint with respect to Southern California?

The Witness: For the future.

Exam. Hall: What have you for the past?

The Witness: The same thing as was brought out.

Exam. Hall: Under 162?

The Witness: 162. Identically the same as the other areas enumerated. I believe the exhibit is self-explanatory.

Exam. Hall: What you are asking the Commission to do with respect to the rates in the future to San Francisco from British Columbia producing points is what? I notice you have a rate of 64 cents there?

The Witness: We request the Commission to order the Defendants to publish a 64 cent rate subject to the increases in Ex Parte 166.

Exam. Hall: Would that be the December 31, 1946 rate of 58 cents increased by 6 cents?

The Witness: Yes.

Exam. Hall: And compounded by the Ex Parte 166 increases?

The Witness: Yes.

Exam. Hall: Would that be true of all the other points shown on the exhibit? [74]

The Witness: Yes.

Mr. Burkett: Would that be from the Canadian border or from the Canadian producing points?

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Fred H. Tolan.)

The Witness: We are asking it from the Canadian producing points.

Exam. Hall: You are asking the Commission to prescribe a 64 rate from the Canadian producing points to San Francisco?

The Witness: Yes, that is right, if, in their opinion, they can do so; if, in their opinion, they cannot prescribe rates North of the Border, we are asking that they prescribe what rates they deem necessary from the American carriers from the Border to eliminate the violations of the Act.

Exam. Hall: What rate would you think would be proper from the American side of the Border to San Francisco?

The Witness: I would say, if it had to be prescribed from the Border, the 64 cent rate, subject to Ex Parte 166, should be prescribed on the basis of the existing divisions of this rate. If, for example, the Canadian carriers got 10 per cent, it should be reduced accordingly.

Exam. Hall: We have nothing to do with divisions?

The Witness: Then I would put it on a mileage basis, the 64 cent rate, or such percentage of that distance as is within the United States should be prescribed from the Border.

Exam. Hall: Have you got the distances on the exhibit?

The Witness: No, sir; I have not. [75]

Exam. Hall: The Commission could not very

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

well make a mileage distribution of the rate unless it has the distances.

The Witness: The distances are in tariffs on file with the Interstate Commerce Commission, and under Rule 80; I did not bring that in. However, it was strictly an oversight.

Exam. Hall: Assuming, of course, that the Commission would not have jurisdiction to prescribe a through rate from British Columbia to San Francisco, as representative of the San Francisco Bay points, but would have the jurisdiction to prescribe a rate on the American section of that movement from the American side of the British Columbia Border to San Francisco, what rate would you suggest, in cents per hundred pounds, should have been prescribed on January 1, 1947?

The Witness: For example, figuring that the mileage is 95 per cent within the United States, I would request that the rate from the Border be 95 per cent of the 58 cents, subject to the additional 6 cents.

Exam. Hall: I asked you about January 1, 1947. Is that the date 162 went into effect?

The Witness: That is correct.

Exam. Hall: Then your suggestion would be 95 per cent of 64?

The Witness: There is a technical problem there, the adjusting of the 6 cent maximum.

Exam. Hall: I am just now confining it to the date of [76] January 1, 1947. I am not going be-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

yond that. Any rate going into effect in the future would have to be built up compounded by 166 increases?

The Witness: That is right.

Exam. Hall: With that understanding, then what would your suggestion be as to the rate to be prescribed for the specific date of January 1, 1947, in compliance with the order in Ex Parte 162?

The Witness: From the Border only?

Exam. Hall: Yes.

The Witness: I would still compute that, sir, at the mileage pro rata; assuming 95 per cent of the mileage was within the United States,—I don't know what the exact mileage is,—but assuming 95 per cent of the mileage is in the United States, I would take the 58 cent rate and take 95 per cent of that, and then add 6 cents to the rate, getting your total rate.

Exam. Hall: How would you publish that? As a proportional rate?

The Witness: I would publish that as a proportional; it would be a part of a through movement; there is no peat produced at the Border to be moved. Therefore it would have to be a proportional.

Exam. Hall: Suppose the Canadian railroads would not cooperate and they decided to increase the rates, and leave you [77] where you are?

The Witness: That is one of the difficulties of International Law, or International rate-making.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

One answer to that is, we are not selling the poultry litter in California; you can only pad a rate so far, and I believe the commercial necessity would force them to make a restoration of the rate.

I have one sheet exhibit which sets forth the tariffs in which peat is carried under the caption of fertilizer.

Exam. Hall: That will be identified as Complainant's Exhibit 8, Witness Tolan.

(Complainant's Exhibit No. 8, Witness Tolan, marked for identification.)

Exam. Hall: I think Exhibit 8 is self-explanatory, and I don't think it needs any comment, does it?

The Witness: May I make just one, because it was brought out by counsel for the Defendants. Counsel for the Defendants stated that in this area peat is never treated as a fertilizer. We direct the Examiner's attention to Paragraph 7, in which the rates are definitely flagged "fertilizer," and under that heading we will find peat.

This covers rates from British Columbia as well as rates in the North Pacific Coast Freight Bureau tariff.

Exam. Hall: All right. Proceed to the next.

The Witness: The next exhibit is a letter which I received from Mr. Van Court, August 26, 1947, of the Southern Pacific Railway. [78]

Exam. Hall: That will be identified as Exhibit 9, Witness Tolan.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Fred H. Tolan.)

(Complainant's Exhibit No. 9, Witness Tolan, marked for identification.)

The Witness: This letter is a report of the rate application by the Standing Rate Committee in Chicago. I direct particular attention to the underscored portion on Page 2 of this exhibit. This exhibit was filed as a result of conversations between myself and the Standing Rate Committee, and correspondence between myself and the 162 Tariff Interpretations Committee. The Interpretations Committee ruled that the problem was particular to the Pacific Northwest and was not particular to other peat producing area, and therefore suggested that the matter should be handled as a rate application rather than as an interpretation of Ex Parte 162. Later, however, effective March 29, 1948, the Tariff Interpretations Committee reversed themselves and published a 6 cent maximum in tariff 162, but from January 1, 1947, until March 29, 1948, the 6 cent maximum was not applicable in the master tariff. This is a conclusion of the Standing Committee in Chicago with respect to why the 6 cent maximum should be applied on peat.

Mr. Tjossem: I ask that all this testimony with respect to this exhibit be stricken. The Examiner stated the issue to be whether the carriers did or did not comply with the orders issued in Ex Parte 162; what some Standing Committee did [79] or what somebody in the railroad had to say about it, I don't think makes any difference.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

The Witness: Mr. Examiner, counsel seems to think that the entire case is addressed to Section VI. I would like to point out that there are Section I and Section III violations also alleged.

Exam. Hall: That is enough. I don't want any more observations on either side about that. I want to read this document before I make a ruling. My ruling will be that this exhibit can stay in the record. I might say that it is rather noncommittal; I don't think it supports the general question one way or another, except to show that the matter had been brought to the Standing Committee of the railroads and they concluded, for reasons of their own, to give the article the fertilizer rate; but there is nothing in here that I see that deals with the interpretation of the order. That Committee does not express any opinion one way or the other, as I see it. However, I will leave that in the record.

The Witness: The next exhibit is a four-page document from the Central Freight Association, Chicago, on the subject of peat, noibn, ground or not ground, CL, EB; Transcontinental rates.

Exam. Hall: That will be identified as Complainant's 10, Witness Tolan.

(Complainant's Exhibit No. 10, Witness Tolan, marked for identification.) [80]

The Witness: This is a further report of the Central Freight Association on the same subject, in which they considered this in relation to traffic within their own area. I would draw particular atten-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

tion to the underscored portion on Page 4 of this exhibit.

Mr. Tjossem: I take it, from the statement of the witness, that this is a similar document to Exhibit 9, and I would like to make the same objection, and I assume it would be overruled on the same grounds, but I would like to have the record show I still object to it. By the way, Mr. Tolan, who signed this letter?

The Witness: I don't know who signed it, because it was a formal report from the Central Freight Association; the letter was simply sent out without any signatures, I believe.

Mr. Tjossem: That is, the Central Freight Association?

The Witness: What happens is that the Standing Committee makes recommendations; that was the recommendation that they made, which they put forward to the Eastern lines; the Central Freight Association in granting their concurrence made this ruling, which is my Exhibit 10.

Exam. Hall: Where did you get this?

The Witness: It was mailed to me from the Central Freight Association in reply to my request. We were urging them all the time to get some action, to prevent injury in the future,—

Exam. Hall: This was not signed? [81]

The Witness: It is a clerical error if it was not signed. It is a matter of public record.

Exam. Hall: I see what it is.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

Mr. Tjossem: I don't think it is properly received in evidence.

Exam. Hall: I will receive it in evidence because it shows that the carriers have been confronted with this situation and have been considering it.

Mr. Tjossem: We will admit that; if it is for the purpose of showing that the carriers are considering it, we will admit that. If the matters therein contained are merely for the purpose of showing consideration, we have no objection to that; but if it is offered for the purpose of showing the verity of the matters therein, we have objection.

The Witness: I want to point out that the action has been resolved into a tariff publication; so it does have the additional weight of having been resolved to real action.

Exam. Hall: All right. I will overrule the objection and leave the exhibit in.

The Witness: Complainants offer Exhibit 1 to 10 in evidence at this time.

Exam. Hall: All right. Subject to the objections so far registered, and subject to cross examination, Exhibits 1 to 10 will be received in evidence.

(Complainant's Exhibits 1 to 10, inclusive, Witness Tolan, [82] received in evidence.)

Exam. Hall: Off the record.

(Discussion off the record.)

The Witness: That concludes my direct examination.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Fred H. Tolan.)

Cross Examination

Q. (By Mr. Tjossem): Mr. Tolan, I will ask you to refer to your Appendix A of your complaint, and on Line 13 of the first page of the Appendix you show a movement from New Westminster to Webster, South Dakota? A. Yes.

Q. The routing is shown as BCE-CPR-Q-CMStP&P. I would take it, from the routing to the destination, that the initial movement on that shipment was by CPR, which connects with the Soo Line in the Midwest; isn't that correct?

A. I would not know without perusing the bill of lading and the freight bill on it.

Q. Do you assert now the routing shown on that Appendix 1 is incorrect?

A. No. But you ask me to tell where the car was interchanged, and I am not in a position to do that, but I would speculate it was at the Canadian Border.

Q. About how far from the Pacific Coast, approximately? A. I don't know.

Q. Would it be in Montana?

A. I would imagine it would be interchanged at Portal or Noyes. [83]

Q. Will you refer to your Appendix, on the same page, origination, South Fraser Street, and destination Pittsburgh, Kansas, and the routing shown on GN-DWP-CStPM&O-MoP. Do you know where the Canadian lines would interchange?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

A. Well, likely at Duluth. Well, it would be anybody's guess.

Q. On Line 31, you have a car originating at South Fraser Street, destination Mercer, Missouri, and the routing is CN-DWP-CStPM&O-CRIP. I presume that the first "CN" means "GN," or Great Northern. Do you know whether that would be interchanged at Duluth with the Canadian carriers?

A. There are all matters of pleadings on record, and what possible value can that have?

Exam. Hall: Don't argue with counsel. Just answer the question.

Mr. Tjossem: I just cite those as examples of numerous shipments which are in the complaint here.

Q. (By Mr. Tjossem): What relief are you seeking as to the charges made when the Canadian carrier takes the product from the British Columbia area to Duluth, and from there delivery is made into the Middle Northwest by the American carrier? What relief do you expect from the Interstate Commerce Commission?

A. If that is a Section VI violation, complete relief without exception. If it is not a Section VI violation, then the only thing the Interstate Commerce would order is that [84] which they could legally do, and it would be based on the divisions within the United States. Rather, the distance within the United States.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Fred H. Tolan.)

Q. I take it that it is your contention, if it's a Section VI violation, that you can get the full reparations on those movements that you are requesting?
A. That is right.

Q. Will you refer to your Exhibit 1, on Page 2, Sub-paragraph 9. You have a statement there, "Minimum car mile earnings on all trans-continental carload traffic moving on minimum weights of 40,000 lbs. or less." Then you say, on basic rates, 10 cents per car mile, all freight. What do you mean by the statement, "all freight?"

A. That is referred to in my former statement, it applies to all freight carried in the same tariff that carries the peat moss rate.

Q. In other words, the earnings figures there have not been based upon any per mile earnings,—they do not reflect any actual earnings on any commodity by the carrier Defendants here?

A. No; it is the minimum that is described in the item referred to in Section 9, Page 2, my Exhibit 1.

Q. Will you explain that a little further. What comparison are you trying to make in your Exhibit 9,—in your Sub-paragraph 9, Exhibit 1? [85]

A. I think the matter is clear when you look at Section 8. We show the rate on basic movement, the fact that the car mile rate on the basic movement is 12.14 cents. In the item we refer to, the Commission has prescribed the aggregate rates on a minimum less than 40,000 pounds, and that the aggregate

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

could not apply if that were less than 10 cents per mile,—per car mile.

Q. In other words, the 10 cents per car mile is the very bottom the carriers will permit; the car cannot move for less than 10 cents per car mile?

A. How is that?

Exam. Hall: I think it is an order of the Commission under the fourth section application, that the carriers cannot go below that, or they will have an unlawful rate; that is, less than the out of pocket cost?

The Witness: That is right.

Q. (By Mr. Tjossem): And that is the only comparison that you are asking to make, or seeking to make in that sub-paragraph of Exhibit 1?

A. Yes.

Q. Now, will you turn to Exhibit No. 2. It may be that that has been explained in view of the statements made in the application of the 166 increases, but I would like to ask one question with respect to the rates that you show under your paragraph No. 1, Group A. I have gone through your Appendix [86] 1 to your complaint, and I find therein no rate which exceeds \$1.08 per 100 pounds. Is my observation correct, that in no instance where you assessed a rate in excess of \$1.08 on the shipments as set forth on Appendix 1 to the complaint?

A. I can answer that voluminously or succinctly, this way: That there are no rates assessed over \$1.08 in Appendix No. 1, unless the shipment was

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

made subsequent to October 13, 1947; in such instances would be \$1.08 plus 10 per cent. Do you wish me to go through the Appendix?

Q. I couldn't find any, and I was just wondering.

A. That may be true; or it may not be.

Q. The point I am making is this, so far as seeking reparations in the trans-continental territory,—that is, the rates in columns C, D, and E, have no bearing on the issue?

A. What do you mean? The January 1st, February 1st and May 6th rates?

Q. That's correct.

A. Definitely, they have. Unless you go back to what we stipulated off the record. The six cent maximum was not incorporated into the rate picture until February 1st of 1948, and therefore we paid on the full 20 per cent basis rather than the six cent maximum basis on all shipments which moved before February 1, 1948. That is why those extra columns are in there. I think the last column is to show the present rate is lower than the rates that were assessed in October, 1947. [87]

Exam. Hall: You have no complaints about the present rates?

The Witness: That's right.

Q. (By Mr. Tjossem): That is the point I am making. You have no complaint about the present rates?

A. No.

Q. You are complaining about the \$1.08 rate,

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

and then you show under Column C, D and E rates in excess of \$1.08, which were in effect for a while; and assuming my statement is correct with respect to Appendix No. 1, that in no instance does it show a rate charged in excess of \$1.08, and in view of the fact that you have no complaint about the present rates, is there any significance to the columns set forth, that is, C, D and E?

A. Answering that question, unless there are no shipments which moved subsequent to October 13, 1947, then your statement is right; but if there are shipments that moved in there subsequent to October 13, 1947, then your statement is wrong. I can check the record, if you would like to have me do so.

Exam. Hall: The answer is plain, that if the Appendix does not show any shipment charged more than the rate of \$1.08, then the columns have no significance?

The Witness: That is correct.

Q. (By Mr. Tjossem): That is what I have been asking.

A. That is right. [88]

Q. That would be true,—again leaving out the Northern California points,—that would be true with respect to each rate shown on the exhibit, and if that is true, those columns would have no significance here.

A. I think there is one point being overlooked in this statement, and that is, that the statement is to show when the 6 cent maximum came in. Otherwise, you can see that we would be protesting the present

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

rates, as we are into California. Obviously, we intend to protest the 20 per cent basis in California, and we could not do so unless we did so to other sections of the country. Therefore, this exhibit is designed not only to show the varying rates, but to direct the attention of the Commission to the great spread in the dates when the 6 cent maximum was incorporated into the rate structure.

Q. In the various rate territories?

A. Yes. Exhibits 3 and 4 are in there for the dual purpose.

Q. In so far as the rates stated in the Columns C, D and E exceed any rate applicable to the destination or origin groups therein shown,—exceed the highest rate charged to the same point in Appendix 1, the level of the rates have no significance in this hearing?

A. With the additional information I just brought out.

Exam. Hall: Don't repeat.

Mr. Tjossem: I think that is clear enough.

Q. (By Mr. Tjossem): Now, will you turn to your Exhibit 6. As [89] I understand this Exhibit, you have made certain comparisons between the rates, for example, between British Columbia points and Chicago, showing the increase that was made in those rates immediately after the effective date of the 162, and compared the effective rate of 162 from Columbia Falls, Maine, to the same point; is that correct?

A. Yes.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

Q. Do you know the distance from New Westminster, for example, to Chicago, Illinois?

A. That is in Appendix No. 1. That is the actual distance, in conjunction with the Great Northern-Northwestern; it is 2,239 miles; that is the actual route mileage.

Q. What is the mileage from Columbia Falls, Maine, to Chicago, Illinois?

A. I would guess it is probably 1200 miles, but that would be just a guess.

Q. Do you know the mileage from the point in Quebec, in Column 3, Line 3,—from there to Chicago?

A. I am not familiar with the Canadian rail geography as much as I am with the American rail geography. It is very difficult to estimate the mileage.

Q. Do you know the mileage from any of the other points in Canada to the named destinations on any of the other lines up to and including Line 8 on Page 2? A. No. [90]

Q. Do you know, Mr. Tolan, whether there is an actual movement of peat moss from Columbia Falls, Maine, to Chicago, Illinois?

A. Other witnesses will bring that out; personally, I do not.

Q. And that is the same as to all of the points shown on 2 to 8, inclusive, of this exhibit?

A. That is correct.

Q. Do you assert that the relationship in rates,

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

for example, between New Westminster and Chicago,—that the basic rate is 72 cents as shown by the exhibit, and that such rate was reasonably related to the 45 cent rate from Columbia Falls to Chicago?

A. No; I made no such allegation.

Q. Do you have any idea whether such basic rates were reasonably related?

A. What do you mean by reasonably related?

Q. In other words, the relationship is on a basic rate before Ex Parte 162 took effect? As I understand the exhibit, there was a 72 cent rate from New Westminster to Chicago, and at the same time there was a 45 cent rate from Columbia Falls, Maine, to Chicago. Would you say that those rates were properly adjusted, one to the other?

A. I would not know until I had made a detailed analysis. The only thing I can say is that both rates were long standing.

Q. Do you know whether the rates were prescribed by the Interstate [91] Commerce Commission or published by the carriers.

A. The rates from Columbia Falls, Maine, were prescribed by the Commission; and the peat moss rate was prescribed by the Commission in the Eastern fertilizer rate; peat moss in that case was taking the fertilizer rate.

Q. How about the British Columbia rate to Chicago; was that prescribed by the Commission?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

A. Not to the best of my knowledge. I am quite certain it was not.

Q. At what point do you make your comparison? Let me put it this way. I take it from your exhibit that, in order to make the comparison that you do, do you not have to assume that the rates as shown therein, comparing the rates from British Columbia to the destination, with the rates from Maine to destination, and the Canadian points named to destination, under the base rates, were properly adjusted or have you considered the impact of the 162 increase as making an unreasonable adjustment of the rates?

A. Will you rephrase that; I don't think I can follow you.

Exam. Hall: I think you can answer it by saying that you took the rates as you found them, and that you took them as properly related?

The Witness: I would adopt that statement?

Q. (By Mr. Tjossem): Now, will you turn to your exhibit No. 7. In response to the Examiner's question as to what rates you are proposing from British Columbia points to Northern California, [92] as shown in this exhibit, I recall that you made the statement that you are seeking through rates from the Canadian point to the Northern California destination, provided the Commission had the authority to prescribe them; is that correct?

A. Yes.

Q. I notice your exhibit, as it is now framed, is

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Fred H. Tolan.)

based on rates from British Columbia producing points to the California destinations?

A. That is right.

Q. Do I understand that you are amending your exhibit?

A. That was brought out through Examiner Hall, in which I said that if the Commission does not have the power to prescribe a through rate from the producing point in British Columbia to San Francisco, using that as an example of Northern California rates, then we ask that any rates that could be established be established from the Border on a milegae basis.

Q. All right. I want to come down to that. It seems to me, in qualifying your exhibit that way, you do not have any proposed rates from the Border to these Northern California destinations?

A. I might suggest that that testimony is as much a part of the record as the exhibit.

Q. As I recall, you did not give the Examiner a definite answer on what your proposal is, and I want to know if you are making a proposal, and if I understand what your proposal is; if [93] Exhibit 7 is amended so that in the event it is found the Commission cannot prescribe from the origin to the California destinations, in that event you are requesting the rate therein set forth to be reduced by deducting from the rate, as therein shown, the percentage figure of the rate, which percentage figure

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

is derived by determining the percentage of Canadian haul to the total haul?

A. That is a rather long way of saying what we want. As I understand it, if I correctly understand you, it could be phrased much more simply.

Q. Let us put it on a concrete standpoint. If, for example, the rate that you are seeking to San Francisco is 64 cents, and the mileage from the Border to San Francisco is 95 per cent of the mileage from the Canadian origin to San Francisco, the rate that you seek and which you are now proposing is 95 per cent of 64 cents per 100 pounds?

A. That is not exactly the way I put it to Examiner Hall. I would take the base rate of 58 cents, and take 95 per cent of that, using that as an example of the mileage; I would use 95 per cent of the 58, figuring it down to the nearest round cent, and then I would add 6 cents to it.

Q. That is your contention in the event the Commission finds it cannot prescribe through rates from the Canadian origin to destination?

A. That's correct. [94]

Mr. Tjossem: That is all I have.

Exam. Hall: That seems to be all.

(Witness excused.)

Mr. Tolan: I will call Mr. Carnicroff.

Plaintiffs' Exhibit No. 2—(Continued)

E. E. CARNCROFF

was sworn and testified as follows:

Direct Examination

Q. (By Mr. Tolan): Will you please give your name? A. E. E. Carncroff.

Q. What is your address?

A. 1485 Douglas, New Westminster, British Columbia.

Q. What company are you connected with?

A. I am with the Western Peat Company.

Q. What is your position with that Company?

A. Managing Director.

Q. How long have you been with that Company?

A. Since 1929.

Q. Do you act in any capacity with the peat industry, other than as a managing director of the Western Peat Company?

A. I have an unofficial capacity, at times as a spokesman for the Canadian Peat Association.

Q. Would you outline very briefly the amount of production at your plant, and the area in which you operate?

A. We are producing at the present time,—let me explain that we have three or four plants. We have a combined production [95] of about 500,000 bales of peat moss. We ship into British Columbia, into the Canadian territory, practically all over the United States, with the exception of East of the Mississippi River, where we ship very little.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of E. E. Carnicroff.)

Mr. Tjossem: Is that testimony on behalf of the Association or the Western Peat Company?

Mr. Tolan: Western Peat Company only.

The Witness: That's right.

Q. (By Mr. Tolan): How do you market your peas in the Midwestern territory?

A. We have distributors in that territory.

Q. Do you sell f.o.b. Westminster, or do you sell at delivered?

A. We sell delivered.

Q. Do you have any production by your Company in the East?

A. We have an operation in Shippegan, New Brunswick.

Q. Have you seen Complainant's Exhibit No. 6, listing Columbia Falls, Maine, and other places in the East?

A. Yes.

Q. Is there any movement from those towns into the areas that you ship into?

A. I do not know the movement out of Columbia Falls. Columbia Falls is apparently the shipping point for the operations in Cherryvale, Maine.

Q. Do you know what the movement is out of Shippegan, New Brunswick? [96]

A. Yes. Last year there were approximately 60,000 bales out of Shippegan.

Q. Do you know of any movement out of Port Colbourne?

A. I know there is a movement; I do not know what the movement is.

Q. Do you know how it moves?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of E. E. Carnicroff.)

A. There is a movement from Riviere Du Loup to Duluth; there is ready to move at the minute 250,000 bales.

Q. Do you know how many bales of peat moss you produce at your plant in British Columbia per year?

A. We produce between 450 and 500 thousand bales.

Q. Do you sell all the peat that you produce?

A. Well, you better get the dates; sometimes we do, and sometimes we have a holdover.

Q. Take the year 1946?

Mr. Tjossem: Where?

Q. (By Mr. Tolan): In British Columbia?

A. Yes. All but a small amount that we normally carry over.

Q. About how much is that?

A. Approximately 15 to 20 thousand bales.

Q. How do you produce your peat there? By the artificial drying method or the sun drying method?

A. Sun drying method.

Q. Can you schedule your production to your sales?

A. Only within limits. We operate on time factors and on [97] weather, and we have to anticipate sales so that when we start a production cycle, we anticipate that next year we will have so many thousand bales of peat moss. So that it is very difficult to schedule the production to the sales, if there is much variance.

Plaintiffs' Exhibit No. 2—(Continued)

Testimony of E. E. Carnicroff.)

Q. You have testified that you sold all your production in 1946? A. That's right.

Q. Did you sell all your production in 1947?

A. All with the exception of probably a carry-over of 20,000 bales. I might say that these carry-overs are a deliberate action on our part.

Q. Have you had any loss and damage claims on any shipments that you have made?

A. Very, very few. We may have had over the last three years; we may have had 10 claims.

Q. Would you say they are significant or insignificant?

Mr. Tjossem: I'll object to that as wholly ambiguous. If he tells us what it was, the Commission can determine.

A. You mean the amount of the claims?

Q. (By Mr. Tolan): Against the railroads?

A. We have never made a dollar's claim since we have been in business.

Q. Do you have to use the best quality cars for peat shipments East, or can you use any type of closed equipment? [98]

A. We can use any type of closed equipment, provided it has the cubic capacity.

Q. And the cubic capacity is governed by what?

A. We have to meet the minimum weight requirements.

Q. Have you experienced buyer resistance in the Middlewest during the year 1947?

A. Buyer resistance in the Middlewest,—in the

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of E. E. Carneroff.)

Spring of 1947, the buyers were, using the term, cranky; and then in the Fall of 1947, we had a definite outbreak of buyer resistance.

Q. And did it affect your sales?

A. It definitely affected our sales.

Q. Have you raised your price on peat bales at New Westminster within the last two or three years?

A. No, we have not changed the price, except that there may have been minor changes to make adjustments.

Q. Have your costs of production gone up?

A. They have risen rather sharply in the last two years.

Q. Why weren't your prices raised when the costs of production were increased?

A. We have reached the point in our delivered price of peat moss where we figure that the consumer is paying all the traffic will bear, and the minute those prices are increased we get consumer resistance, and, as a result, get decreasing sales of the peat moss. As a matter of fact, I might enlarge [99] upon that; I think the consumer is paying too much for his peat moss now; he is not getting value for it.

Exam. Hall: That is, no matter where he gets it?

The Witness: Let me qualify that. It is on the longer hauls. The consumer in the State of Washington is getting value for his money.

Q. (By Mr. Tolan): An earlier witness, Mr.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of E. E. Carneroff.)

Pittack, testified with reference to the use of horticultural peat. Did you hear his testimony?

A. Yes.

Q. Does peat have any value for the soil?

Mr. Tjossem: Just a minute. I don't know that this man is qualified as a soil expert or analyst.

Exam. Hall: Let us find out what he knows about it.

Mr. Tolan: Strike the question, and I will lay a foundation.

Q. (By Mr. Tolan): Have you made a study of the effect of peat on soil conditions? A. Yes.

Q. How long have you made that study?

A. I have made that study ever since 1928. I would say that I have the best library on the subject of peat of anybody in the country, that is, in Canada; I have a complete library, and I have everything that I have been able to get on the subject. I have a fairly complete library of American and [100] Canadian publications.

Q. Now, Mr. Carneroff, what is the effect of peat on soil conditions, when properly applied?

A. As Mr. Pittack testified this morning, it has the effect of making adobe soil pliable and mellow. It has the effect of making some of the clay soils also mellow. It has the effect, in sandy soils, of enabling such soils to hold large volumes of water. The peat is mixed into the soil; it holds water like a sponge; and the little rabbit hairs, they seem to

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of E. E. Carncroft.)

reach out and get hold of the water, just like a sponge.

Q. Are you familiar with the importations of peat into the United States? A. Yes.

Q. Does the Department of Agriculture classify horticultural peat as fertilizer?

Mr. Tjossem: I'll object to that. What the Department of Agriculture classifies it, is certainly not an issue in this proceeding.

Exam. Hall: I think we should have the Department of Agriculture publications so classifying it, but if this man knows the answer, he may answer.

A. That was the subject of litigation; there was some court litigation in 1940, and it was ruled by the court at that time that horticultural moss was fertilizer.

Exam Hall: What court? [101]

The Witness: The ruling came out of the Customs Court in New York.

Mr. Tjossem: I submit that was made for the purpose of applying duty, obviously, and it has no bearing on what the commodity is, and it has no bearing on the issues, and I think it should be stricken.

Exam. Hall: Well, I will sustain the objection. We will get into a long discussion here which I don't think is necessary.

Mr. Tolan: You may cross examine.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of E. E. Carnicroff.)

Cross Examination

Q. (By Mr. Tjossem): You testified with respect to Exhibit 6, and to the past movement from peat moss from some of the points therein named. As I understand, you testified with regard to some movement from Riviere, shown on Lines 3 and 4, and that there was ready to move a quarter of a million bales of peat moss? A. That's right.

Q. That is a movement this year?

A. That is this year's crop that has been prepared and is under cover.

Q. You didn't give any testimony as to what, if any, did move in the past?

A. I would have to guess.

Q. I don't want you to guess. [102]

A. I don't have the complete figures on that.

Q. Now, as to shipping in New Brunswick. I think you testified there was a movement there.

A. I have accurate knowledge of our own plant here.

Q. And that was a movement to Chicago, Cincinnati, Detroit, and such places? You know that would move from Shippegan, New Brunswick to those points? A. No.

Q. What do you know?

A. We move through the Eastern states, to a wide variety of points. I don't know specifically, offhand; I did not come specifically prepared to name any points there.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of E. E. Carneroff.)

Q. That point,—Port Colbourne, Ontario. What knowledge do you have of any rates shown there to destinations in the United States?

A. I am not familiar with it; I know there is a movement is all.

Q. Do you know whether there is a movement to Detroit, for example? A. I don't know that.

Q. Do you know whether there is a movement to St. Louis? A. I do not know.

Q. How about the points shown on Lines 7 and 8 on Page 2? Do you know whether there is a movement from Manitoba to Chicago?

A. Yes; there are about 40,000 bales of peat moss there.

Q. That are going to move? [103]

A. Yes.

Q. How about last year?

A. There were about 25 or 30 thousand bales of peat moss moved.

Q. To Chicago?

A. No; it moved into the Midwestern territory.

Q. Was there any movement to Kansas City from there? A. There undoubtedly was.

Q. Do you know?

A. No, but I know the distributor there, and I know he handles a lot of peat moss in Kansas City. If he did not do so, it would be a miracle.

Q. What percentage of your product shipped out of British Columbia is fine ground and what is coarse ground?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of E. E. Carnicroff.)

A. Approximately 60 per cent is fine ground and 40 per cent coarse ground.

Q. You testified with respect to decreasing sales when you raised your prices. Does that take place as to both types of peat moss, both the fine and the coarse ground? Do you find that buyer resistance as to both types, that you testified to?

A. Partially, and partially not. With respect to the coarse ground peat moss, the buyer is much more touchy than the buyer of the fine ground moss. That is, the buyer of the fine ground moss is usually a city man who wants to put in a lawn, and he is not so touchy in the pocket as the poultry man is.

Q. From your knowledge of the use of peat moss on land, would [104] you say that peat moss adds any food to the soil? A. It is negligible.

Q. The actual effect is the conditioning of the soil rather than adding food for the plants?

A. That is the case.

Q. And by conditioning the soil it aerates and helps the soil to retain the moisture?

A. That's right.

Q. The testimony that you gave as to the method of handling the peat moss was confined to your own Company? A. That's right.

Q. In other words, you testified as to the movements and production of the Western Peat Company? A. That's right.

Mr. Tjossem: I have nothing further.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of E. E. Carneroff.)

Redirect Examination

Q. (By Mr. Tolan): I have one question. You testified you have a shipping point in Eastern Canada? A. Shippegan, New Brunswick.

Q. Are you a member of the Canadian Peat Association in British Columbia? A. Yes.

Q. Do other members have plants in the East?

A. Other members of the Association?

Q. Yes. [105] A. To my knowledge, no.

Q. Then you are the only member that has a plant outside of British Columbia, who is a member of the Canadian Peat Association of British Columbia, you having a plant in New Brunswick?

A. That is correct; Shippegan, New Brunswick.

Exam Hall: Where is Shippegan?

The Witness: Shippegan is right in the very Northeastern tip of New Brunswick.

Exam. Hall: For example, take a rate from Shippegan to New York. The basic rate is shown on this Exhibit #6 as 42 cents. There is also a basic rate shown from British Columbia points as 90 cents to New York. Now, do you ship from both of those points to New York?

The Witness: We have shipped to New York; we do not make it a practice. Any shipments that were put into New York were accommodation shipments; that is, someone was stuck there and we had a carload and we sold it to him; we sell very little peat moss East of the Mississippi River.

Plaintiffs' Exhibit No. 2—(Continued)

Testimony of E. E. Carneroff.)

Exam. Hall: Take Chicago. Do you ship to Chicago from both points?

The Witness: We have not shipped any moss from Shippegan to Chicago, but we readily could.

Exam. Hall: Do you have any idea what would be the distance from Shippegan to Chicago, versus New Westminster to Chicago, approximately? [106]

The Witness: I would say about 2200 miles from here to Chicago, and to put it at a guess it would be 2 or 14 hundred miles from Shippegan to Chicago.

Exam. Hall: There is somewhere around 1,000 miles difference in your haul?

The Witness: That is correct.

Exam. Hall: Now, you have a 54 cent basic rate from Chicago,—from Shippegan to Chicago, and a basic rate of 72 cents from New Brunswick,—New Westminster to Chicago. Could you use both of those rates?

The Witness: Yes.

Exam. Hall: Would it be practical for you to make all your shipments from Shippegan instead of from New Westminster, if you wanted to fill your Chicago orders?

The Witness: No, because we have not got far enough into the matter of production there.

Exam. Hall: How about your production at Shippegan?

The Witness: We have this year had about 45,000 bales.

Exam. Hall: Suppose you had an order in Chi-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of E. E. Carneroff.)

cago for 20,000 bales. You could ship that to Chicago at 54 cents?

The Witness: Yes.

Exam. Hall: I was just wondering, as a matter of argument,—entirely aside from the tariff question,—you might well make the argument that a shipper at Columbia Falls to Chicago, with a basic rate of 45 cents as compared with a shipper at New [107] Westminster to Chicago with a rate of 72 cents, would have an advantage. That, if each of them got a six cent increase, percentagewise the man at Columbia Falls would be paying a relatively higher rate than the man from British Columbia?

Mr. Tolan: May I make a comment?

Exam. Hall: I am just leaving it here for what it is worth. You can put that in your brief. You are excused.

(Witness excused.)

Mr. Tolan: That completes the Complainants' case at this time.

Exam. Hall: All right. We will hear from the Defendants.

Mr. Tjossem: I was going to say that I intended to make a statement before I put on our case, but I think the discussion between counsel and the Examiner has pretty well clarified our position. I will call Mr. Rathbun.

Plaintiffs' Exhibit No. 2—(Continued)

H. G. RATHBUN

was sworn and testified as follows:

Direct Examination

Q. (By Mr. Tjossem): Will you state your name, address and occupation?

A. H. G. Rathbun; Claim Investigator for the Transcontinental Freight Bureau, 307 Union Station, Seattle, Washington.

Q. Are you stationed in Seattle? A. Yes.

Q. Did you make an investigation to determine the relative [108] density or weight per cubic foot of various fertilizers as compared with the weight per cubic foot of peat moss? A. I did.

Q. When did you make that investigation?

A. I weighed some of the fertilizer on September 3 and I weighed some yesterday, November 9. The peat moss, I got the weight from the track scales.

Q. Did you make an exhibit showing your method of ascertaining the weight per cubic foot, and outlining the procedure that you followed?

A. Yes.

Q. And the results you obtained? A. Yes.

Mr. Tjossem: May that be marked for identification?

Exam. Hall: That will be Exhibit 11.

(Defendants' Exhibit No. 11, Witness Rathbun, marked for identification.)

Q. (By Mr. Tjossem): Handing you what has

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of H. G. Rathbun.)

been marked for identification as Exhibit #11, I will ask you what that is?

A. That is my detail of the weights taken here in Seattle on fertilizer versus peat moss.

Q. Do I understand from the exhibit that you actually weighed the sacks and noted down these weights under the columns showing gross?

A. Yes. [109]

Q. You then show the number weighed, and the average weight? A. Yes.

Q. And you show then the number of cubic feet in each sack?

A. As nearly as I could measure it by getting a full sack. It is not square.

Q. But you did it as closely as you could?

A. Yes.

Q. And what did you find?

A. It ranged from 57.37 pounds per cubic foot to 86 pounds for fertilizer.

Q. As stated in pounds per cubic foot?

A. Yes.

Q. What did you ascertain with respect to peat moss?

A. We took four carloads from New Westminster to Seattle, 360 bales to the car. We took the average weight of those, and the measurement is, in inches, 21x19x39 for the bale, and we figured the number of cubic feet, and it worked out 11.5 pounds per cubic foot. That measurement on that bale will not cover all bales, because there are various types,

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of H. G. Rathbun.)

some with lesser capacity and some with larger. But I was informed by Mr. C. H. Lilly, or one of his men, that that was a good average.

Q. You did the work yourself? A. Yes.

Mr. Tjossem: You may cross examine. [110]

Cross Examination

Q. (By Mr. Tolan): Do you know of any movement of superphosphate from British Columbia to the Midwest?

Mr. Tjossem: I'll object to that as improper cross examination; he has not testified to any movement of anything.

Exam. Hall: I think the objection is well taken.

Mr. Tolan: No further questions.

Mr. Tjossem: I offer the exhibit.

(Defendants' Exhibit No. 11, Witness Rathbun, received in evidence.)

Mr. Tjossem: That's all.

Exam. Hall: You may stand aside.

(Witness excused.)

Mr. Tjossem: I will call Mr. Anderson.

O. M. ANDERSON

was sworn and testified as follows:

Direct Examination

Q. (By Mr. Tjossem): Will you state your name and occupation for the record, please?

A. My name is O. M. Anderson; I am Assistant

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of O. M. Anderson.)

General Freight Agent of the Great Northern Railway, located at 402 Great Northern Railway Building, Seattle, Washington.

Mr. Tolan: I will admit the qualifications of Mr. Anderson.

Q. (By Mr. Tjossem): Mr. Anderson, are you familiar with the complaint filed by the Complainants in this proceeding? [111] A. I am.

Q. Have you examined into the rates to the transcontinental territory from the points of origin here? A. Yes.

Q. Do you have a statement in connection with those rates? A. Yes.

Q. You may proceed.

A. Before I proceed, I would like to identify the exhibits which I have here. The first one, which will be No. 12, I believe?

Exam. Hall: No. 12.

The Witness: That is a chronological statement of rates on peat and peat moss, as described in Item 5915 Agent L. E. Kipp's ICC 1527 from North Pacific Coast origins to Eastern lettered group destinations.

(Defendants' Exhibit No. 12, Witness Anderson, marked for identification.)

The Witness: The next is a chronological statement of rates on fertilizers and fertilizer compounds, with the tariff authority set forth there from North Pacific Coast origins to Eastern lettered group destinations.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of O. M. Anderson.)

(Defendants' Exhibit No. 13, Witness Anderson, marked for identification.)

The Witness: And No. 14 will be a statement showing rates in effect January 1, 1947, on peat and peat moss from New [112] Westminster, British Columbia, Named in Kipp's ICC No. 1527 to representative points in transcontinental groups showing revenue per car and per car mile.

(Defendants' Exhibit No. 14, Witness Anderson, marked for identification.)

The Witness: No. 15 is a statement showing rates in effect January 1, 1947, on dried blood and tankage, described in Item 4540, sulphate of ammonia, nitrate of calcium, manufactured fertilizer and fertilizer, NOS, described in Item 4545, and animal manure, described in Item 4550 of L. E. Kipp's ICC 1527 from Seattle, Washington, to representative points in transcontinental groups, showing revenue per car and per car miles.

(Defendants' Exhibit No. 15, Witness Anderson, marked for identification.)

The Witness: And Exhibit No. 16, a statement showing rates in effect January 1, 1947, on dried blood and tankage, described in Item 4540, Sulphate of ammonia, nitrate of calcium, manufactured fertilizer and fertilizer, NOS, described in Item 4545, and animal manure, described in Item 4550 of L. E. Kipp's ICC 1527 from New Westminster, B. C., to representative points in transcontinental groups, showing revenue per car and per car miles.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of O. M. Anderson.)

(Defendants' Exhibit No. 16, Witness Anderson, marked for identification.) [113]

Q. (By Mr. Tjossem): Will you outline the history of the rates set forth in Exhibit No. 12?

A. The Complainants involved in these proceedings are attacking the rates charged on peat from British Columbia points to points throughout the United States. In this testimony I will deal with the transcontinental portion of the complaint.

An examination of Appendix consisting of 37 sheets attached to the complaint develops that there were approximately 726 carloads to transcontinental territory. Exhibit 12 shows a chronological statement of rates on peat and peat moss, from North Pacific Coast origins, including British Columbia, to the Eastern transcontinental lettered group destinations. The transcontinental grouping has been substantially the same for a long period of time. The present grouping and that in effect since October 1st, 1945, is named in North Coast Territorial Directory No. 40-J, L. E. Kipp's ICC No. 1516. The commodity rates on peat moss are those named in Item 5915 of L. E. Kipp's ICC 1527 and apply upon peat NOIBN, ground or not ground. The term NOIBN means "Not otherwise indescend by name" in Western Classification nor otherwise specified in any other item of that tariff carrying the eastbound carload commodity rates between the same points.

The Western Classification described commodity peat NOIBN, ground or not ground, in packages,

Plaintiffs' Exhibit No. 2—(Continued)

Testimony of O. M. Anderson.)

Also carloads loose with the rating of Class "D", minimum 30,000 pounds. There is no [114] carload commodity rate upon peat or peat moss in East-bound Transcontinental Tariff 2-P, L. E. Kipp's CC 1527 other than the rates named in Item 5915 of that tariff.

The commodity rates to territory Group D and West were published effective April 2, 1936, in order to enable the British Columbia producers to meet the competition in the Chicago area and the Middle West with imported peat moss from Sweden and Germany. The imported product was being delivered at Gulf and Atlantic ports at prices stated to be as low as \$1.10 per bale of 140 pounds (T.C. Application 18096). The Class D rate in effect April 2nd, 1936, was \$1.37 to Groups D and H, \$1.30 to Groups E and F, and \$1.10 to Group J.

The carriers realize that the 65 cent rate at 30,000 pounds minimum producing \$195.00 per minimum car for haul from the Pacific Coast to Chicago was extremely low but agreed to these substantial reductions to enable the British Columbia shipper to meet this severe import competition.

The next important change was made effective December 24th, 1936, at which time the rates were increased 5 cents per cwt. under the Ex Parte 115 proceedings. The 5 cent increase under Ex Parte 115 was removed effective March 1st, 1937.

The rates were then increased 10% under Ex Parte 123 effective March 28th, 1938.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of O. M. Anderson.)

The next important changes were made during 1940, under [115] which rates were established to Groups A, B, C, C-1, K, L, M and N on a graded basis with relation to the rates in effect to territory Group D and West. These rates were increased 6% under the Ex Parte 148 proceedings effective March 18th, 1942. The Ex Parte 148 increase was suspended May 15th, 1943, but was again restored effective July 1st, 1946.

The rates were then increased 20% under the Ex Parte 162 increase proceedings effective January 1st, 1947. The Ex Parte 162 increase was applied to the base rates not including the Ex Parte 148 increase.

Effective December 1st, 1947, the rates were reduced to the territory Group C-1 and West to the basis 6 cents over the rates in effect May 15th, 1943. The rates to Groups A, B and C territory were reduced to basis of 6 cents over the May 15th, 1943, rates effective February 1st, 1948, and similar adjustments made in the rates to the Southeast in Groups K, L, and M effective March 29th, 1948. The reduction in the rates to basis of 6 cents over the May 15th, 1943 rates was made because the rates upon peat from Wisconsin, Michigan and other Eastern states were increased a maximum of 6 cents per 100 pounds for the reason that in those territories peat was carried upon the fertilizer basis and automatically secured a 6 cent maximum increase under the increased tariff.

Plaintiffs' Exhibit No. 2—(Continued)

Testimony of O. M. Anderson.)

The Commission in their decision of December 5, 1946, in Ex Parte 162, authorized percentage increases with certain [116] maximums on particular commodities. In the case of fertilizers, NOS, covered by Group 640 of the Railway Accounting Officers Commodity Classification, they authorized an increase of 20 per cent with a maximum of 6 cents per 100 pounds of \$1.20 per net ton. Group 640 of the Railway Accounting Officers Association Commodity Classification of 1928 issued pursuant to the Order of Divisions 4 of November 22, 1927, in the matter of freight commodity statistics named various commodities under the heading of Fertilizers, NOS, including ground or unground peat.

The carriers published under authority of the Commission's decision in Docket X-162 their tariff of increased rates and charges No. X-162 Effective January 1, 1947, issued for account of various agents of the railroads, including L. E. Kipp, and bears his ICC No. A-3657. In Item 107 of that publication an increase of 20 per cent with a maximum of 6 cents per 100 pounds was published upon fertilizer and articles listed in tariffs making reference to this tariff as and when taking the fertilizer rates. Application was filed by shippers with the Ex Parte 162 Committee seeking interpretation that where specific rates were named on peat or peat moss they be given the same increase as on fertilizer. The Interpretation Committee considered the matter and ruled that where rates on peat or peat moss were

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of O. M. Anderson.)

published in fertilizer lists that the increase under Ex Parte 162 was 20 [117] per cent with a maximum of 6 cents per 100 pounds but that where rates were not so published they would be subject to the general increase of 20 per cent without maximum except that when moving on Class rates in official territory and between official territory and eastern Canada the increase would be 25 per cent and when moving in territorially the increase would be 22½ per cent (Interpretation No. 35, Letter No. 9 of February 28, 1947, by W. J. Kelly, Secretary, Interpretations Committee). The matter was later given further consideration on representation that rates from eastern Canada to points east of Mississippi River crossings moved on fertilizer rates and received a 6 cents maximum increase whereas rates to points west of Mississippi River crossings moved on peat commodity rates and took a 20 per cent increase, and carriers decided to provide a maximum increase of 6 cents irrespective of whether or not peat was carried in the fertilizer list.

The publication of a 6 cents maximum on peat is considered by the carriers to be their own voluntary act and was not required by the Commission's orders in Ex Parte 162.

I would like to make a further comment about the exhibits, and that is I did not attempt to increase any of these rates by Ex Parte 166 increases.

Exhibit 13 is a statement of rates on fertilizers from North Pacific Coast points to these same

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of O. M. Anderson.)

transcontinental lettered [118] group destinations. I might say that the rates were originally established with a view of providing a rate that would enable the Pacific Coast producers to meet the competition in the Western Trunkline and Eastern territory, with the producers of fertilizers like those located in the Middlewest and East.

Mr. Tolan: You are speaking of items listed on this Appendix, or of peat?

The Witness: I am speaking of Exhibit 13. There have been no changes in these rates other than the increases by the Ex Parte proceedings beginning with Ex Parte 123, and they are all explained on the exhibit, with the exception of the sulphate of ammonia rate, March 27th, 1948. That was a reduction that was made in order to assist the producer at Salem, Oregon, to ship and sell his product in Chicago and the Middlewest.

Q. Do you have any further comment on Exhibit 13?
A. No.

Q. Will you explain what Exhibit 14 shows?

A. Exhibit 14 is a statement showing rates in effect on January 1, 1947, on peat and peas moss from New Westminster, British Columbia, to representative points in transcontinental lettered groups.

Exam. Hall: Well, now, that exhibit is self-explanatory unless there is something that you wish to point out.

The Witness: I wish to point out the range. The car mile earnings revenue will range from 10.68 per

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of O. M. Anderson.)

car mile to a high [119] of 21.05 per car mile, and is based upon a weight of 38,503 pounds per car, which rate, by the way, was secured by tabulating the weights that were submitted by the Complainant in the Appendix attached to the complaint. In other words, this is an average of all those shipments. Now, if we made the same calculations, using the tariff minimums, we would have a range of car mile revenue from 9.43 to 18.59 cents per car mile. I think the exhibit is self-explanatory.

Exam. Hall: Off the record.

(Discussion off the record.)

Q. (By Mr. Tjossem): Can you explain why you picked these destination points?

A. I examined the shipments shown on the Appendix, and I took them down, or broke them down into various transcontinental lettered groups and selected the principal points in the group to which shipments were actually made. For example, I took Syracuse, New York, because I didn't find any shipments to New York City, for example, but I found several to Syracuse.

Q. And you selected the destination points on the same analysis and basis?

A. That is correct.

Q. Have you any further comment on Exhibit 14?

A. No, except to say that the mileages are the shortest what I would term reasonable routes. I won't say that they are the very shortest routes, be-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of O. M. Anderson.)

cause I didn't attempt to use seven [120] or eight railroads.

Exam. Hall: Are they tariff routes?

The Witness: Yes, they are tariff routes.

Q. (By Mr. Tjossem): Turn to Exhibit 15.

A. Exhibit 15 is a statement of rates on fertilizer, together with the revenue per car and per car mile, using a weight of 71,826 pounds, and also revenue per car and per car mile based on the tariff minimums. The weight of 71,826 pounds was secured from a study made by the lines serving Seattle, Tacoma and Portland. I don't recall whether it was a three-month period or longer.

Mr. Tjossem: I might just add, I will have a later witness who will show the breakdown for the 71,826 pounds.

Mr. Tolan: What figure is this?

Mr. Tjossem: Average loading of fertilizer, 71,826 pounds.

Exam. Hall: That exhibit is clear, and unless you want to point out some high spot on it,—

The Witness: The only thing I want to point out here is the revenue per car mile.

Exam. Hall: That is on the exhibit?

The Witness: Yes.

Exam. Hall: That is argument, and it can be argued in the brief.

The Witness: All right.

Mr. Tjossem: Turn to Exhibit 16, Mr. Anderson.

A. By the way, Exhibit 15 shows the results,

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of O. M. Anderson.)

using Seattle, [121] Washington as the point of origin.

Exhibit 16 is prepared in the same manner as Exhibit 15, except that we have used New Westminster, British Columbia as the point of origin. Now, rates do apply from New Westminster and from the Pacific Coast territory generally, and I showed this so that it could be matched with the earnings on peat moss from New Westminster, although I am not aware of any substantial movement from New Westminster. I think the exhibit otherwise is self explanatory.

Q. Do you have any further comment to add on that exhibit, Mr. Anderson? A. I think not.

Q. If you will recall Mr. Tolan's testimony, he read the items that were published, in which the carriers had construed and did construe to allow a 20% increase on the rates applying on peat when they published their change in the tariff pursuant to Ex Parte 162. Do you recall the item read by Mr. Tolan? I think Mr. Tolan made some comment. Would you say that that was an unusual method of publishing an item in the tariff? Was the language unusual or unique?

A. No. You will find that there were several items where maximum increases came into play. I refer to one in particular, the increase applying on grain and grain products and so-called articles taking those rates, as and when taking grain and

Plaintiffs' Exhibit No. 2—(Continued)

Testimony of O. M. Anderson.)

rain products rates, and I could cite several others, of [122] you would like.

Q. And then it is your statement that it is not out of the way to publish the rates in the manner that that item was published? A. No.

Mr. Tjossem: You may cross examine.

Cross Examination

Q. (By Mr. Tolan: Is there any essential difference, Mr. Anderson, between my Exhibit No. 2 and your Exhibit No. 12?

A. Well, I don't think so, although I didn't examine the two very closely in comparison. I would say there is substantially no difference, except I think you showed the Ex Parte 166 increases in the last part of 1947; I did not do that.

Q. Do you think, Mr. Anderson, that it is right for the six cent maximum to be applicable to the Middlewest on December 1, 1947, and not to have it applicable to the Eastern receivers until February 1st?

Mr. Tjossem: I think that question is wholly argumentative. You can discuss that in the brief. I don't think counsel should argue it with the witness.

Exam. Hall: Well, he is a rate expert. I will get his opinion on it.

A. Well, the fact is, when you published the 78 cent rate on December 1 to the territory of Chicago and West, there also was submitted the same proposal to the Eastern and Southern [123] railroads,

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of O. M. Anderson.)

and they didn't see fit to join in the rates as of that date. The Eastern lines,—they concurred later, and their adjustment was published effective February 1st, and the Southern lines subsequently concurred and their adjustment was made effective March 29, 1948.

Exam. Hall: Then I take it that the transcontinental lines, the originating lines, did not control the adjustment, but that it was the destination lines?

The Witness: Well, they controlled the adjustment up to Chicago, but not East of Chicago, nor to the southwest.

Exam. Hall: Were these published as one-factor rates and not combination?

The Witness: No, sir.

Exam. Hall: It comes to this, then, that they did control the publication of that rate?

The Witness: They controlled it to their territory.

Exam. Hall: So far as you are concerned, it was a one-factor rate, and the shipper could not find anything but the rate from the origin to the Eastern destination; would it be correct?

The Witness: Yes.

Exam. Hall: I take it that your admission or statement is that, so far as you are concerned as an originating line, you would have been willing to publish the rate?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of O. M. Anderson.)

The Witness: As of that date, December 1st, 1947. [124]

Exam. Hall: But there was a difference of opinion, and the Eastern lines would not go along with that?

The Witness: I might put it this way, that they considered it at their meetings, and they just took a certain length of time to get around to it.

Exam. Hall: I understand it. There must be a difference of opinion on the Eastern lines; otherwise, the whole group of carriers would have got together and published what they thought was the proper rate under the order?

The Witness: This was not published as a result of any idea that we were required to publish it under the order.

Exam. Hall: I am not saying that, but I am trying to get the procedure in publishing the rate from a transcontinental origin to a destination East of Chicago.

The Witness: Well, the procedure is this: When the transcontinental lines consider any proposition, they determine it upon a certain set of rates, not only Chicago and West, but into the East and Southeast, and they submit the proposal to those jurisdictions for their concurrence, and they allow a certain period for those lines to act; and if they don't act within a certain time we usually proceed with the rate in the territory of Chicago and West, irrespective of what they do East of Chicago.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of O. M. Anderson.)

Exam. Hall: Let me ask you this, and if you think it is not fair, you do not need to answer. If you had full control [125] over the publication of the rates from the transcontinental origins to the destinations East of Chicago on January 1, 1947, what increases would you have applied on peat moss?

Mr. Tjossem: That should be December 1, 1947.

Exam. Hall: I accept the correction, counsel. On December 1, 1947?

The Witness: We would have published the rates that were subsequently established, because our group approved those rates, and the only reason they were not published on those dates was because of the lack of concurrence on the part of the Eastern or Southern lines.

Exam. Hall: That is, on the lines West of Chicago where you had complete jurisdiction, you published the six cent increase?

The Witness: On December 1, 1947.

Mr. Tolan: I thank the witness for a very frank answer to that question.

Q. (By Mr. Tolan): Turning to your Exhibit 13, do you know of a dried blood movement eastbound from Seattle to transcontinental destinations? A. No, I do not.

Q. Do you know of any sulphate of ammonia eastbound to transcontinental destinations?

A. Well, I just don't know; I have not made an investigation.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of O. M. Anderson.)

Q. Do you know of any eastbound movement of manure from Seattle [126] to eastbound destinations? A. Probably not.

Q. Isn't it true that manure is not moving eastbound, and that there is an application before the carriers to provide a lower rate on manure from the Montana area to the Coast?

A. I know we have had request to reduce the rates, yes.

Q. Isn't the Lilly Company moving a substantial quantity of manure westbound, and not eastbound?

A. Well, I will say this; they are not moving any via the Great Northern, that I know of, at least.

Exam. Hall: Mr. Anderson, in connection with your Exhibit 13, did you make some correction on that? My copy says the North Pacific Coast origin.

The Witness: That is correct.

Q. (By Mr. Tolan): I believe you said that this was from Seattle. Do you know?

A. No. I said that the average load that we used on Exhibit 15 was based on the tonnages of fertilizer from Seattle, Portland and Tacoma.

Q. Just to clarify the record, even though you used the word, "Seattle," wouldn't that cover any place West of the Cascade Mountains? Do you know of any movement of this type to eastbound destinations?

A. There are other commodities named.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of O. M. Anderson.)

Exam. Hall: What are you referring to? [127]

Mr. Tolan: I am referring to the exhibit.

Q. (By Mr. Tolan): You have listed only dried blood, sulphate of ammonia and manure.

A. Well, the heading of the exhibit says that there are certain commodities described in a certain item of L. E. Kipp's Tariff 1527.

Exam. Hall: Let us not take time for that. If the exhibit is misleading,—

The Witness: I don't think it is misleading; I don't think it needs any correction.

Exam. Hall: Well, it is to me. If you are going to refer to a tariff item and put in a lot of other commodities, I say to that extent the exhibit is not complete. You have dried blood, sulphate of ammonia and manure.

The Witness: Well, those are the principal items named. I will say that there may have been movements from some North Coast points; I am not aware of that, because I don't know.

Q. (By Mr. Tolan): You will say there is not any movement? A. No, I do not know.

Q. You are familiar with the volume of movement given in my Exhibit No. 1, 1268 cars?

A. Yes.

Q. None of these would approximate that movement, from your knowledge?

A. No, I don't imagine they would. [128]

Q. Do you have any idea of the value of 100

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of O. M. Anderson.)

pounds of dried blood as compared with 100 pounds of peat moss? A. No, I don't.

Q. Or of sulphate of ammonia? A. No, sir.

Q. Or of manure? A. No, sir.

Q. Now, in working out your Exhibit 14, Mr. Anderson, I note, for example, you have testified to the 09.43 car mile earnings into New Orleans. Have you any idea how many cars moved into New Orleans?

A. No, but I can tell you there were 19 carloads that went from points in Louisiana; some of those, no doubt, from New Orleans.

Q. How many cars went into Iowa?

A. There were 96 cars into Iowa.

Q. How many cars into Kansas?

Exam. Hall: Let us not get into all the details of the specific car movements. I will ask you this question: So far as you know, were there movements to every point shown on the exhibit?

The Witness: Definitely. These points were selected from the Complainants' Exhibit; there were movements to or from every point, and, in some cases, a number of cars.

Q. (By Mr. Tolan): Would you refer to Exhibit 15. The same [129] objections which I brought out to Exhibit 13, lack of knowledge of movements on Eastbound traffic, and no knowledge as to the value, would be equally applicable as to Exhibit 15; is that correct? A. That's right.

Q. You know of no movement of any of the spe-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of O. M. Anderson.)

cific items on Exhibit 15, eastbound?

A. Well, I know of none; but I am not saying there are none.

Exam. Hall: If there isn't any movement, why would they go to the expense of publishing the rate?

Mr. Tjossem: He did not say there was no movement; he said he did not know of them.

The Witness: Well, there may have been in the past.

Exam. Hall: If there are not any moving today, and apparently you don't know, the carriers should get rid of the tariff items.

The Witness: I daresay, if you wanted to ship manure from Montana to some points in the East, you probably would use this rate; or from any of these points here named.

Q. (By Mr. Tolan): The movement, however, is not a matter of your knowledge?

The Witness: As a maximum, I doubt if there is any rate on manure from Montana to points East of Chicago, in Tariff 1514.

Q. (By Mr. Tolan): You mean that the manure, if there is any movement, would probably move from Montana and not from British [130] Columbia?

A. Well, there might be a movement from Utah under these rates.

Q. Do you contend the basic rates on peat moss are unreasonably low?

A. I say they are low. Any rate that runs a car

Plaintiffs' Exhibit No. 2—(Continued)

Testimony of O. M. Anderson.)

mile revenue as shown on these exhibits would be a low rate.

Q. Has this matter been up for a year and a half?
A. What do you mean?

Q. Well, I will put it this way. Since this matter has been up for a year and a half, have the carriers made any effort to raise the rate?

A. Other than the general increase?

Q. Other than the basic rates themselves?

A. Don't forget that we made the rates to try to help the shippers sell their products in the East. We know that the rates are low, and they run a low revenue per car.

Q. Did they develop the business that you hoped they would?

A. They certainly developed a lot of business.

Q. Are you familiar with the rates from Eastern Canada and Maine to the points I listed on Exhibit , into Midwestern points and points West of Chicago?

Exam. Hall: I don't think he needs to answer that. He didn't testify on rates in Eastern Canada.

Mr. Tjossem: Improper cross examination.

Q. (By Mr. Tolan): You stated for the record that the secretary [131] of the Interpretations Committee ruled that peat moss was not subject to a six cent maximum?

A. Mr. Kelly did not rule, but the Interpretations Committee did rule.

Q. Did he rescind that action later?

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of O. M. Anderson.)

A. No, sir.

Exam. Hall: You are excused.

(Witness excused.)

Mr. Tjossem: I would like to offer Exhibits 12 to 16, inclusive.

Exam. Hall: Exhibits 12 to 16, inclusive, will be received in evidence.

(Defendants' Exhibits 12 to 16, inclusive,
Witness Anderson, received in evidence.)

Mr. Burkett: I will call Mr. Zika.

FRANK J. ZIKA

was sworn and testified as follows:

Mr. Burkett: I have some exhibits here which Mr. Zika is going to discuss, some six or seven of them, and I think it would be well to identify them now.

Exam. Hall: They will be identified. How many do you have?

Mr. Burkett: I think I have seven.

Exam. Hall: The first one will be 17, and the others will be numbered in order.

(Defendants' Exhibits 17 to 23, inclusive,
Witness Zika, [132] marked for identification.)

Direct Examination

Q. (By Mr. Burkett): Will you state your address?

A. 65 Market Street, San Francisco, California.

Q. I forgot to ask your name?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

A. Frank J. Zika.

Q. By whom are you employed, and what position do you hold?

A. I'm employed by the Southern Pacific in the capacity of Commerce Agent, on the staff of the Freight Manager, in charge of rates and divisions.

Mr. Tolan: We will accept the qualifications of the witness and avoid going through that, to conserve time.

Q. (By Mr. Burkett): In whose behalf do you appear as a witness?

A. I am appearing on behalf of the Southern Pacific and on behalf of the California, Arizona and Nevada Lines, Defendants.

Q. Are you familiar with the issues involved in this proceeding so far as they involve those carriers?

A. I am.

Q. Have you prepared a series of exhibits for introduction in evidence in this proceeding?

A. I have.

Q. They have already been marked for identification, and will you please refer to the first of these exhibits, which has been marked by the Reporter as Exhibit 17, bearing the designation "Statement showing chronological history of changes in [133] basic joint rates on peat, carloads, from New Westminster, B.C., as representative of British Columbia origins, to representative destinations in California."

A. Exhibit No. 17 shows changes in rates from

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

date of March 6, 1937, when through joint carload rates on peat were first published from New Westminster, B. C., to California destinations. It shows to what destinations rates were first established and the additional destinations subsequently added.

The rates on Column 2 of 80 cents to San Francisco Bay district and 100 cents to Southern California were established effective March 6, 1937, to meet cost of handling by steamer and rail to points in interior of California. Subsequent study developed that very little of the peat was moving from Canada because of import competition through direct sailings from Germany and Sweden to the Pacific Coast. Customs figures for San Francisco show importation of European peat of 4455 net tons in 1936, 4633 net tons in 1937, and 3279 net tons for the first eight months of 1938. From Germany rate was \$7.80 per 1000 kilos (2205 pounds) equivalent to 35.38 cents per 100 pounds. Handling charge was 40 cents per net ton and state toll 15 cents per net ton, making 38.13 cents per 100 pounds on docks at San Francisco. From Sweden rate was \$9.00 per 1000 kilos, equivalent to 40.81 cents per 100 pounds, which plus handling and toll charges made total 43.56 cents per [134] 100 pounds on dock at San Francisco.

California distributors not having foreign accounts were extremely anxious to secure outlet for Canadian peat and were considering movement by rail to Seattle, Washington, for 15 cents per 100

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

pounds, then by steamer to San Francisco at rate of 34 cents or total of 49 cents. All-rail combination over Seattle was 15 cents plus a non-intermediate rate of 43 cents from Seattle to San Francisco, a total of 58 cents. The 43-cent rate was published on a 9-cent arbitrary over the water rate, that being the minimum spread the rail lines were permitted under Fourth Section relief granted in Pacific Coast Fourth Section Applications, 165 ICC 373, decided July 10, 1930.

It was the rail lines' judgment that through rates were equivalent to rail Fourth Section rate combination from British Columbia to San Francisco were necessary to meet the foreign and coastwise competition and rates of 58 cents to central California with related rate of 73 cents to Los Angeles were established, effective June 30, 1939, as shown in Column 4 of the exhibit. Subsequently related rates were established to other destinations located north and south of the San Francisco area.

The next major change is that shown in Column 7 as becoming effective August 6, 1940, involving a rate to Southern California of 72 cents. This change was necessitated by reduction [135] in rate from British Columbia, Washington and Oregon to the Middlewest to meet foreign competition in that territory, as already explained by a previous witness, and such depressed transcontinental rate was held as a maximum in Southern California.

In Columns 14 and 15, I have shown the rates

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

which became effective January 1, 1948. Shortly before that date the rail lines because of the Commission's decision in ICC Docket 29721—All-Rail Commodity Rates between California, Oregon and Washington, 268 ICC 515, and related cases, had been giving consideration to increasing various Pacific coastwise rail rates, including the peat rates from British Columbia.

A proposal was placed on the public docket to increase the peat rates to the full 25% increase sought in Ex Parte No. 162 proceeding instead of the 20% granted. It developed, however, that this could not be done to Southern California because such rate could not exceed the transcontinental rate which had been reduced to a gross rate of 78 cents for reasons already explained by a previous witness. Increasing the San Francisco base rate of 58 cents a full 25% would have made that gross rate 73 cents. Because this would have resulted in a spread of only 5 cents under the Southern California rate, it was decided to do no more than publish as a gross rate to the San Francisco area the base rate of 58 cents increased 20%, or 70 cents. [136]

The Report in ICC Docket 29721 gives a comprehensive history of the Pacific Coastwise rail rate structure, so I will not burden this record with its details. It is necessary to explain, however, that the Commission in that proceeding permitted the rail carriers to increase a specified list of commodities approximately 4.2% over rates resulting from Ex

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

Parte No. 162 increase. In permitting this increase the Commission stated that rail carriers could propose similar increases in their other coastwise class and commodity rates. The proposal to further increase peat rates was a result of that suggestion.

In report on ICC Docket 29721 the Interstate Commerce Commission also ordered cancellation of the previous existing fourth section relief in all-rail rates between Pacific Coast ports. This had the effect of cancelling the non-intermediate water competitive rate on peat from Seattle to San Francisco that had served as basis for the competitive rate established from British Columbia to California.

Exhibit 18 was prepared to show the assailed and sought gross rates compared with constructive gross rates. The constructive basis is what the rate level originally established March 7, 1937, would have been on January 1, 1947, if there had been no intervening rate reductions due to competitive conditions.

The January 1, 1947, rates in Column 14 include the applicable [137] Ex Parte No. 162 increase of 20% while those in Column 15 are on basis of including the 6 cent maximum increase sought by Complainants. For example, the San Francisco rate on Line 1 shows the assailed gross rate to be 70 cents while Complainants seek a gross rate of 64 cents. The constructive basis would have provided a gross rate of 106 cents with the applicable Ex Parte No. 162 increase and 94 cents with the sought

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

Ex Parte No. 162 increase. In either case the constructive rates are substantially higher than the assailed basis.

Exhibit No. 19 shows briefly the changes in the rail rates from Seattle, Washington to San Francisco and Los Angeles, California, and the coastwise water rates from Seattle to San Francisco and Los Angeles Harbor from the date of June 29, 1939, when such rates were used as basis for reducing joint rate from British Columbia to California destinations. It will be noted in Columns 6 and 7 that by December 31, 1946, the San Francisco base rates had been increased 12 cents and the Los Angeles base rates 16 cents, the rail rates at all times having preserved the 9 cent arbitrary required in the Fourth Section authority. In the same period the joint base rate from British Columbia origins to California destinations, although originally based on the Seattle to California water competitive factors had not been increased.

In Column 8 the exhibit shows that effective September 15, [138] 1947, as result of the proceeding cited, the water competitive non-intermediate rail rates were cancelled because the Interstate Commerce Commission vacated and set aside the Fourth Section relief.

Exhibit No. 20 was prepared to supplement my earlier testimony with respect to basis for reducing the through joint rates from British Columbia origins to San Francisco, effective June 30, 1939.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

This exhibit shows in Column 3 the rate factors when the reduction was made. The rates on Lines 2 and 5 are the non-intermediate rates on peat permitted under the Fourth Section relief authorized in Pacific Coast Fourth Section Applications, 165 ICC 373, decided July 10, 1930, based on 9 cents over the coastwise steamer rates to San Francisco and Los Angeles Harbor. In Column 4 I show what the same combination would have been on December 31, 1946. By that time the water rates had increased 12 cents to San Francisco and 16 cents to Los Angeles Harbor, with same increase having been made in the rail non-intermediate rates.

If instead of reducing the through rates on June 30, 1939, the rail lines had continued to permit combination rates to apply based on the depressed port-to-port non-intermediate rates the combination to San Francisco on December 31, 1946, would have been a base rate of 70 cents instead of 58 cents, and to Los Angeles a base rate of 90 cents instead of 72 cents.

Column 5 shows that the sought increase of 6 cents added to [139] such combination rates would have produced gross rates of 76 cents and 96 cents, respectively, to San Francisco and Los Angeles. These figures can be compared with the assailed rates shown in Columns 6 and 7 and the sought rates shown in Columns 8 and 9.

Exhibit No. 21 shows number of shipments from the various British Columbia origins to destinations

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

in California, Arizona and on Southern Pacific Company in Oregon to which shipments moved in the year 1947. Except for the 88 cars destined Los Angeles, this showing indicates that movement is sporadic and traffic could generally be expected to move on a maximum reasonable basis of class rates.

Exhibit 22 is intended to show how the assailed gross rate, that is, the base rate plus applicable Ex Parte 162 increase of 20%, compares with Class D and E rates for short line distance based on ICC Docket 14999 scale. Class D was the applicable Western Classification rating in Agent R. C. Fyfe's ICC No. 26 and subsequent issues. Class E rating was applicable under exception published in Agent W. J. Bohon's ICC No. 677 and Southern Pacific's ICC No. 4563 to destinations in Oregon and Washington. The Class D and E scale rates are also shown as gross rates but are on a basis of including the sought Ex Parte No. 162 increase of 6 cents maximum instead of the applicable 20% increase.

It will be noted that such constructive Class D rates in [140] Column 4 are in all but one instance less than the assailed gross rate and that all but four are even less than the constructive Class E basis.

Columns 6 to 9 make a similar showing as to rates from International Boundary, Washington, located north of Blaine, Washington, on the United States-Canadian Border. This is intended to show that reasonable rates were in effect from the inter-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

national border for use in making combination rates with local Canadian factor if no joint international rates were in effect. Local rate from New Westminster, B. C., to International Boundary, Washington, was and is 9 cents, per Great Northern Railway GFO 771-G, C.T.C. No. 2349.

Columns 10 to 13, inclusive, show a similar comparison involving rates from Redmond, Washington, a producing point on the Northern Pacific Railway near the Canadian Border. This shows that assailed rates from British Columbia origins compare favorably with rates maintained from a United States origin to same destination in California. Traffic from Redmond, Washington, would move over same rails as traffic from British Columbia origins, except for a short distance of 7 miles from Redmond to Woodinville, Washington. In making this comparison with class rates I should like to call attention to the fact that in C. H. Lilly v. Great Northern Railway, et al., 253 ICC 417, the Commission found that Class E rates applied to carload shipments of fertilizer between certain [141] points in Mountain-Pacific territory were not unreasonable. However, in this case we are dealing with a commodity which is not a fertilizer.

Exhibit No. 23 is a statement showing various assailed rates applied on carload shipments of peat from British Columbia origins to destinations on Southern Pacific Company in Oregon and California, the rates sought by Complainants to same

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

destinations, and comparisons made of such rates with rates sought to be applied on shipments to destinations in Washington, Idaho and Utah.

For example, on Line 5, it is shown that Complainants consider charges under a rate of 86 cents unreasonable for a distance of 1417 miles from New Westminster, B. C., to Los Angeles, California, and they seek rate of 78 cents for that movement.

On Lines 7 to 11 in Column 7 it is shown that for much shorter hauls ranging from 650 miles to 1078 miles Complainants indicate their satisfaction with application of a rate of 78 cents.

Q. (By Mr. Burkett): Does that conclude your testimony, Mr. Zika? A. Yes.

Mr. Burkett: I offer Exhibits 17 to 23, inclusive, in evidence.

Exam. Hall: Exhibits 17 to 23, inclusive, will be received. [142]

(Defendants' Exhibits 17 to 23, inclusive, Witness Zika, received in evidence.)

Mr. Burkett: You may inquire.

Cross Examination

Q. (By Mr. Tolan): Would you refer to your Exhibit 17, please. You pointed out that the rates presently established as shown on that exhibit were based to meet foreign competition? A. Yes.

Q. Then, why did you state that the rates were put in to meet foreign competition, and then in the

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

later exhibits compare the port-to-port rates which were not involved?

A. The Canadian lines and the Canadian shippers were prepared to make use of the port-to-port rates to reach California to meet the foreign competition.

Q. But the foreign competition was the situation which you were meeting in California when the rates were established?

A. It was a combination of both. We knew the Canadian shippers were preparing to come into California, and in order to help them meet the foreign competition we made the reduction.

Q. Is there any reason why the same situation that you described with regard to foreign competition could not come back?

A. That would be putting me in the role of a forecaster; I am afraid I cannot tell you.

Q. Do you know of any peat moss that has moved since 1940 on port-to-port rates? [143]

A. No, sir, I do not, because I believe the low rates gave the Canadian shippers an opportunity to move the commodity by rail and it was unnecessary to move on port-to-port rates.

Q. Were there any through water routes from New Westminster, British Columbia or Vancouver, to the California ports?

A. Yes, there were water routes.

Q. Through one-factor rates?

A. I don't know whether they were one-factor

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

rates; I know there were water routes operating.

Q. You stated that you could not apply the full 20% increase into Southern California because of the transcontinental ceilings? A. That's right.

Q. How did you arrive at that?

A. Obviously, with a 78-cent rate in effect from the North Coast, from Washington, British Columbia, to the Middle Northwest, we felt that we could not charge a greater rate than that to Los Angeles.

Q. It was based on Fourth Section departure?

A. No, sir. I might qualify that. The Fourth Section was involved in that shipment may have moved from Washington to Los Angeles.

Q. We are talking about British Columbia.

A. But the same rate applied from Washington, and to the same extent that a shipment could be shipped that way,—

Q. From British Columbia, there was not a Fourth Section departure, [144] but it was merely a matter of policy that established the maximum?

A. Yes.

Q. Well, would you say that it is a sound policy to charge a 6 cent maximum into Southern California?

A. That has nothing to do with the maximum; this had to do with the gross rate to Los Angeles versus a gross rate into the Middlewest and Southwest.

Q. You feel that the gross rate to Southern California is sound policy, but you didn't feel on De-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

Q. cember 1, that the 6 cent maximum was a sound policy into Northern California?

A. I don't quite understand you.

Q. You stated that you considered the 6 cent maximum a sound policy into Southern California. I asked you if you considered the full 20% increase in Northern California,—

A. We considered a 25%.

Exam. Hall: Off the record.

(Discussion off the record.)

Q. (By Mr. Tolan): Do you know of any water movement from the Pacific Northwest into California during the time of water competition?

A. No, sir.

Q. Do you know of any shipment of peat by water from Washington production points into California during the period of water competitive rates? [145]

A. I know of no actual movement, Mr. Tolan.

Exam. Hall: That would indicate that your rates were successful in taking it away from the water lines?

The Witness: I would not say there was a movement or not; I don't know of it.

Q. (By Mr. Tolan): Turning your attention now to Exhibit 18. Will you describe what "constructive" means?

A. It means, being a theoretical rate, going back to the original rates which were established for the movement, and then bringing it up to date, and

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

showing what they would be if they had not been reduced to meet competition.

Q. Have you made any comparable adjustments in other rates such as you have of these peat rates?

A. What is the question?

Q. From New Westminster to California points you have taken a constructive basis and carried it through to conclusion without any intervening changes. Now, have you made changes and adjustments on other traffic moving from New Westminster and the Vancouver area into California during this period of time?

A. Changes have been made in various effective increases over the 20% which was granted by the Commission.

Q. Would you say there was nothing unique about the treatment which was given the peat rate as compared with the average commodity? [146]

A. I don't think I understand you.

Q. Is there anything exceptional about the treatment of peat as compared with other commodities?

A. Yes, we held to an increase of 20% to San Francisco, where as other rates were increased to 25%.

Q. It was a voluntary act?

A. Yes, it was a voluntary act as a result of the Commission's request that we consider other coast-wise rates.

Q. Has the Southern Pacific maintained any policy regarding the commodity rates differential

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

between San Francisco Bay area and the Los Angeles area?

A. Not the Southern Pacific line. The California carriers have a policy on that.

Q. What is that policy?

A. I cannot say whether they have determined the differential should be 15 cents or 20 cents, but there is a formula for adjusting the spread between Los Angeles and San Francisco.

Q. Do you know of any case where the rates have been established on a spread as small as that established on peat moss, Northern California versus Southern California, in other rates where the spread is less than that provided at the present time?

Mr. Tjossem: You mean in terms of percentages or in terms of cents?

Mr. Tolan: Let me rephrase it. [147]

The Witness: I would have to make a tariff study.

Q. (By Mr. Tolan): You don't know at the present time whether there is any rate with as small a spread?

A. I don't know whether that is the only one, or whether there are others that have a less spread; that would be a matter of tariff study.

Q. Great emphasis has been placed by you in the Fourth Section applications in relation to competing rates—were there many other commodities moving under maximum rates that were not substan-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

tially adjusted when the port-to-port rates were considered?

Mr. Tjossem: You mean maximum reasonable rates?

Q. (By Mr. Tolan): Maximum rates published in Section 4 of Tariff 1S?

A. Rates intermediate in application?

Q. Yes.

A. There were many of the rates that were adjusted as a result of the Commission's recommendation in Docket 29721.

Q. Were there any rates that were not raised by the cancellation of the Fourth Section relief?

A. That is something I could not say offhand.

Q. Are you familiar with the glassware rates?

A. No, sir.

Q. You said that,— in your Exhibit 21 you said that that indicates the movement to points other than Los Angeles is [148] sporadic. Why did you come to that conclusion?

A. It is a logical conclusion, when you see only two cars moving to one destination, from various origins.

Q. You base your statement on the fact that 88 cars moved into Los Angeles? A. That's right.

Q. Did you consider that many of the towns having quite a population border very close to Los Angeles? And that much of this peat moss may have gone to those places?

A. That's possible.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

Q. You show 455 cars in one year into the State of California. Was that a sporadic movement? Would you say that is a sporadic movement?

A. Scattered as it was over the State, I would say so, yes.

Q. In your Exhibit 22, you put in rates there from Redmond, Washington. Do you know of any actual movements from Redmond, Washington?

A. Not at the present time, no; in the course of my experience with the rates on the North Coast, there were shipments made from Redmond.

Q. In the past? A. In the past.

Q. In regard to your Exhibit 22, you made a statement wherein you compared the peat moss commodity rates with the class rates; is that correct [149]

A. Yes. Not actual class rates; those are not actual class rates.

Q. Constructive class rates?

A. That is right.

Q. You stated in Exhibit 22, that the C. H. Lilly Company case, Lilly versus the Great Northern, 253 ICC 417, held that Class E rates applied to carload shipments of fertilizer between certain points in Mountain Pacific territory were not unreasonable. Did you mean all points, or some points? A. Yes.

Q. Then they definitely made a decision otherwise on some points?

A. The Commission made the general observa-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

tion that fertilizer moving under Class E rates in inter-mountain territory was not unreasonable. I understand they made no finding of unreasonableness in that decision.

Q. You made another statement with regard to Exhibit 22. "However, in this case we are dealing with a commodity that is not fertilizer." That is a matter of your opinion, is it not?

A. Well, it is a matter of my personal knowledge when I bought peat moss in California.

Q. (By Exam. Hall): It is still a matter of opinion? A. I presume you would call it that.

Q. (By Mr. Tolan): In regard to Exhibit 23, you testified that the Complainants are satisfied with the rates into Oregon; is [150] that correct?

A. No; my statement in connection with Exhibit 23 was based on the complaint wherein you indicated the rate you would be satisfied with into Idaho, Eastern Washington and Utah; so I compared the rates that you felt were reasonable into that territory with rates that you assail in California.

Q. You assumed that because we did not complain of them, we were satisfied?

A. That was my conclusion.

Mr. Tolan: That's all.

Exam. Hall: You are excused.

(Witness excused.)

Mr. Tjossem: I will call Mr. Henderson.

Plaintiffs' Exhibit No. 2—(Continued)

H. R. HENDERSON

was sworn and testified as follows:

Direct Examination

Q. (By Mr. Tjossem): Will you state your name, please? A. H. R. Henderson.

Q. What is your occupation, and by whom are you employed?

A. Assistant General Freight Agent, Northern Pacific Railway, Seattle, Washington.

Q. Are you familiar with the complaint in this proceeding? A. Yes.

Mr. Tolan: We admit the qualifications.

Q. (By Mr. Tjossem): Have you prepared any exhibits in connection [151] with this proceeding?

A. I have.

Q. Have you also prepared a statement in connection with the first exhibit? A. Yes, I have.

Mr. Tjossem: Perhaps we had better have those identified first.

(Defendants' Exhibits 24 to 28, inclusive, Witness Henderson, were marked for identification.)

Q. (By Mr. Tjossem): Will you proceed with your statement, please, Mr. Henderson?

A. All rates mentioned will be stated in cents per hundred pounds.

Prior to January 13, 1930, the rates applying on peat from British Columbia origins to points in Oregon, north and east of Portland, Oregon, Wash-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of H. R. Henderson.)

ington and Northern Idaho were the Class D rates, carrying a minimum of 36,000 lbs.; the Class D rate, for example, from New Westminster to Seattle and Tacoma being 17 cents and to Portland being 33 cents.

As evidenced by a letter from Western Peat Company, Ltd. under date of October 2, 1929 addressed to the Northern Pacific Railway Company, which letter is a part of Exhibit 29, application was made by the Canadian producers of this product in the fall of 1929 to reduce the rate and minimum weight [152] applicable to carload shipments. As a result of this application a rate was published effective January 13, 1930, of 20 cents applying from New Westminster to Seattle with a minimum of 25,000 pounds; reducing the revenue on the basis of minimum carloadings in the amount of \$11.20 per car.

Following this, continuous applications were made by consignees of this product in the State of Washington and by the producers of this product in Canada to lower the rates and to lower the minimums.

The constant demand for these reductions resulted in the following changes: On June 30, 1930, a 14 cent rate was published from New Westminster to Seattle and Tacoma with a minimum of 40,000 pounds. At the same time the Portland rate was reduced to 26 cents, minimum 40,000 pounds.

Effective December 6, 1930, the minimum of

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of H. R. Henderson.)

40,000 pounds on 14 cent rate to Seattle and Tacoma and on the 26 cent rate applying to Portland was reduced to 36,000 pounds.

The continued efforts of Canadian producers and the consignees in Washington to reduce the rates and minimums applying on these shipments lead to a further reduction in rates effective August 6, 1931, at which time the rate from New Westminster to Seattle and Tacoma was reduced to 17 cents with a minimum of 24,000 pounds; and a rate was published to Portland of 33 cents, minimum 24,000 pounds.

On June 20, 1932, rates were published to Portland as [153] follows: 31 cents, minimum 24,000 pounds; 24 cents, minimum 40,000 pounds.

With the publication on January 10, 1935 of the 14 cent rate applying from New Westminster to Seattle and Tacoma with minimum of 30,000 pounds, the minimum carload revenues on this commodity had been reduced to \$42.00 per car as compared to \$61.20 per car, revenue return under the rates in effect prior to January 13, 1930, or a difference of \$19.20 per car.

Effective the same date, a 24 cent rate was published to Portland, minimum 30,000 pounds. The same comparison will show that the carload revenues had been reduced from \$180.80 to \$144, or a reduction on revenue of \$36.80 per car.

The rates previously mentioned which were effective on March 23, 1937, to Seattle and Tacoma, and

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of H. R. Henderson.)

the rates which were effective January 10, 1935 to Portland, remained unchanged except for the ex parte increases permitted by the Interstate Commerce Commission.

It might be pointed out that effective January 8, 1941, the origin points of Fraser Street and Pitt Meadows, B. C. were placed on the same basis as New Westminster on shipments moving to Seattle-Tacoma, Washington and Portland, Oregon.

(Defendants' Exhibit No. 29, Witness Henderson, marked for identification.)

Q. (By Mr. Tjossem): What is Exhibit No. 24?

A. That is a historical statement showing car-load commodity [154] rates and minimum weights on peat since first established January 13, 1930, to and including March 28, 1948, from New Westminster, British Columbia, and related origins, to Portland, Oregon, Tacoma and Seattle, Washington.

Q. Why did you pick out Seattle, Tacoma and Portland?

A. Because there are no through published class rates from New Westminster to most of the points to which shipments move, and these rates to Seattle, Portland and Tacoma are used to make rates beyond. The same is true, that is, used in combination to make rates to points beyond Portland.

Q. This shows the date the rate was made effective, and the minimum pounds per car in each instance?

A. That is right. It shows that the rails were

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of H. R. Henderson.)

trying to help the industry get established in shipping to this territory in competition with European peat.

Q. Have you anything further to say on Exhibit 24? A. No.

Q. What is Exhibit 25?

A. Exhibit 25 is a statement showing the number of cars, total weights, and average weights on shipments of peat from New Westminster, Pitt Meadows and South Fraser Street, British Columbia, to destinations in Idaho, Montana, Oregon, and Washington, to which there was a movement as shown in Complainants' Appendix 1.

Q. What is Exhibit 26? [155]

A. Exhibit 26 is a statement showing the movement of fertilizer during the months of February and March, 1947, from Tacoma and Seattle and North Portland, Oregon, to destinations in Oregon, Washington and Idaho via the Great Northern Railway, Northern Pacific Railway and Union Pacific Railroad. Stating the number of cars, total weights, and the average weight per car.

Q. You have there a figure showing the average weight per car of fertilizer was 71,826 pounds?

A. Yes.

Q. That is the figure used by Mr. Anderson in this exhibit?

A. That is right, in a previous exhibit.

Q. Turn to Exhibit No. 27. Can you tell us what that is?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of H. R. Henderson.)

A. Exhibit 27 is a statement showing the rates, in cents per 100 pounds, on which there was a movement, from New Westminster, British Columbia to destinations in Idaho, Montana, Oregon and Washington, as shown in Complainants' Appendix 1, during the period January 1, 1947, to and including March 28, 1948, compared with the average carload earnings on fertilizer from Seattle, Washington, to equidistant points, during the same period.

Exam. Hall: Well, it speaks for itself.

The Witness: There is only one point, if you want to bring out the per car mile earnings; I think it explains itself.

Q. (By Mr. Tjossem): It is getting late, and [156] I think the Examiner could make the computations if he so desired. The information is there.

Exam. Hall: I will expect counsel to make the computations in the briefs.

Mr. Tjossem: We will do that.

Exam. Hall: I will be frank; if it is not important enough to put it in the briefs, I won't give it much consideration.

Mr. Tjossem: I am willing to do so, and save you the time, as well as saving the time of the hearing here.

Exam. Hall: You can put it in the brief.

Mr. Tjossem: I will be willing to do that.

Q. (By Mr. Tjossem): Will you explain Exhibit 28?

A. Exhibit 28 is a statement showing the mini-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of H. R. Henderson.)

num revenue per car based on classification rating and minimum weight compared with minimum revenue per car based on exceptions to classification, and the tariff references are shown. In other words, this exhibit shows that, had we not made a class E and a class D exception, with varying minimums to apply on this commodity from New Westminster, British Columbia, the class D rates would have applied; and I think it is shown that we made a substantial reduction to help this industry get established in this territory.

Exam. Hall: That is the purpose of the exhibit?

The Witness: Yes.

Q. (By Mr. Tjossem): The territory that you [157] are covering is generally the Pacific Northwest? A. Yes.

Mr. Tjossem: You may cross examine.

Cross Examination

Q. (By Mr. Tolan): Are there any shipments on which we are seeking reparations moving to Seattle, Tacoma and Portland? A. No.

Q. Are any of those involved in the 6 cent maximum about which we are complaining?

A. Not Seattle, Tacoma and Portland.

Q. Are we getting the same increase that fertilizer would get on the same movement to Seattle, Tacoma or Portland?

A. Yes, it would be 20%.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of H. R. Henderson.)

Q. What then would be the purpose of Exhibit 24 and your Exhibit 29?

A. I have already stated that,—

Q. Merely to show assistance to the industry?

A. I show that we used these rates in combination to make them to the points to which you had a movement, as shown in Appendix 1 to the complaint.

Q. Without carrying it to the point that we actually shipped, it has no probative value?

A. Yes, because it is a factor in making the rates; and this is the story as to why we did reduce the rates.

Q. When were the rates reduced? [158]

A. It shows there, January 1930, when we made the reduction.

Q. Then the rates have been established for a long period of time?

Mr. Tjossem: It speaks for itself.

Q. (By Mr. Tolan): Exhibit 26. To what areas were those fertilizer cars shipped?

A. To Oregon, Washington and Idaho.

Q. Do you have any idea of the volume of the fertilizer shipped with relation to the value and volume of peat? Let us confine it to the value?

A. Well, fertilizer is somewhat higher, I imagine.

Exam. Hall: Well, the only purpose of the exhibit is to show the average weight per carload of fertilizer is higher than that of peat; is that right?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of H. R. Henderson.)

The Witness: Yes.

Q. (By Mr. Tolan): Exhibit 27 compares the fertilizer with peat moss rates for equidistant hauls? Do you know of any fertilizer moving from Seattle to Walla Walla, Washington?

A. Let us take all the points. As to some of the points, there was actual movement. But to strike an equidistant point, I used that point; I could have used a shorter distance than Wallair.

Q. Then the exhibit does not cover actual movements, but it is based strictly on equidistances?

A. Yes; there is a movement to points surrounding this point. [159]

Q. But you stated there were no actual movements?

A. Yes, we have to average the movements to get the actual weight.

Q. Returning to your Exhibit 24, and your Exhibit 28. What rate do we make, using a Seattle combination?

Exam. Hall: Just to get one point.

The Witness: Yakima, for instance.

Q. (By Mr. Tolan): In relation to Exhibit 28, you said a full classification would apply if you did not use the exception. How much of the freight in the Pacific Mountain territory moves on class rates?

A. I have not made a study of that.

Mr. Tolan: That's all.

Mr. Tjossem: I offer Exhibits 24 to 29.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of H. R. Henderson.)

Exam. Hall: Exhibits 24 to 29 will be received in evidence, Witness Henderson.

(Defendants' Exhibits 24 to 29, inclusive, Witness Henderson, were received in evidence.)

Exam. Hall: That appears to be all.

(Witness excused.)

Mr. Tjossem: I will call Mr. Madsen.

FRED MADSEN

was sworn and testified as follows:

Direct Examination [160]

Q. (By Mr. Tjossem): Will you please state your name, residence and occupation?

A. My name is Fred Madsen; I am Assistant Chief Clerk, Traffic Department, Union Pacific Railroad, 751 Pittock Block, Portland, Oregon.

Q. Are you familiar with the issues in the complaint in this proceeding? A. Yes.

Q. Did you prepare some exhibits in connection with this case? A. Yes.

Mr. Tjossem: I will ask that the exhibits be marked for identification.

Exam. Hall: How many do you have?

Mr. Tjossem: Three.

Exam. Hall: They will be marked Exhibit 30, 31, and 32, Witness Madsen.

(Defendants' Exhibits 30, 31 and 32, Witness Madsen, were marked for identification.)

Q. (By Mr. Tjossem): Mr. Madsen, referring to

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred Madsen.)

Exhibits 30, 31 and 32, were those prepared by you?

A. Yes.

Q. What is Exhibit 30?

A. Exhibit 30 shows the history of the rates from Seattle, [161] Washington to Idaho and Utah points in effect December 7, 1938, to May 6, 1948, as a result of the shippers' application, effective December 7, 1938, whereby a rate of 57 cents, minimum weight 30,000 pounds, was established from Seattle, Washington, to Twin Falls and Utah common points. Prior to this date, the rate from Portland to these points was 52 cents, which was the published rate from San Francisco to Utah in Pacific Freight Tariff Bureau 51K Item 7770.

Mr. Tolan: Mr. Examiner, I am going to raise an objection to this exhibit on the ground that there is no movement from Seattle, Washington, and the exhibit is irrelevant, and if we could have a ruling,—

Exam. Hall: Well, I will overrule the objection.

The Witness: The rate was first published,—the California rate was first published from Portland to Utah on August 3, 1938. Effective January 6, 1939, the rate of 57 cents was extended from Seattle to Idaho Falls, on the same basis as the Utah rates. Subsequent change is shown on account of Ex Parte increases, and are explained in the exhibit.

Q. (By Mr. Tjossem): Why did you use Seattle as the origin point in the exhibit?

A. There are no through rates to New Westmin-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred Madsen.)

ster, or from New Westminster, and those through rates are made over Seattle.

Exam. Hall: By that you mean, your through rates from New Westminster to Caldwell and Boise are made by a combination over [162] Seattle?

The Witness: Yes, sir.

Exam. Hall: And are those rates complained of in this proceeding, rates from New Westminster to Salt Lake City?

Mr. Tolan: Yes, they are.

Q. (By Mr. Tjossem): Will you explain Exhibit 31?

A. Exhibit 31 is a statement showing carload rates on manufactured fertilizer as described on the second page of the exhibit, from Seattle, Washington, to points in Idaho and Utah in effect from July 5, 1924 to May 6, 1948.

Now, these rates were first put in July 5, 1924, for the purpose of moving this commodity to the points named.

Q. By "this commodity," you mean what?

A. Fertilizer.

Q. This exhibit is simply to show comparable rates on fertilizer from Seattle to the same points shown in Exhibit 30 as to peat moss?

A. Yes, and there have been no changes since publication, except by the Ex Parte increases.

Q. What is Exhibit 32?

A. Exhibit 32 is a statement showing rates in cents per hundred pounds and average carload earn-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred Madsen.)

ings on peat carloads, from New Westminster, B. C. to destinations in Idaho and Utah, to which there was a movement as shown in Complainants' Appendix 1, during the month of January, 1947, to September, 1947, [163] compared with average carload earnings on fertilizer from Seattle, Washington to equidistance points during the same period.

Q. You show the relative earnings based on the average loads of fertilizer and peat moss during the same period? A. Yes.

Q. Have you anything further to offer?

A. Well, the average weight I used on the shipments to Idaho and Utah were 37,991 pounds, and those weights were based on the 14 cars that were handled from British Columbia points to those points, and they are shown on Page 2 of the exhibit.

Q. Those 14 cars were taken from Appendix 1 of the complaint? A. That's right.

Q. Is there anything further?

A. That's all.

Mr. Tjossem: I have nothing further.

Cross Examination

Q. (By Mr. Tolan): Did I understand you to say that all the rates from New Westminster to such points as Salt Lake City, using that as an example, were made on a combination rate over Seattle? A. Yes.

Q. Are you familiar with the transcontinental

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred Madsen.)

rates, 4 Series, applying from New Westminster to Group J points? A. Yes. [164]

Q. Do you have through rates via Spokane?

A. Yes, we do.

Q. Do you know what the through rate is on that route from New Westminster to Denver? I can refresh your memory on it. 72 cents?

A. It is lower than the group rate, I believe. 72 cents, I believe, is correct.

Q. Would the 72-cent rate from Salt Lake City apply via the Great Northern to Spokane, Union Pacific via Salt Lake to Denver?

A. It would on intermediate application.

Q. Then that rate would be 72 cents? If the local rate, basic rate, from New Westminster to Seattle is 15 cents, and you added that to the 60 cent rate, wouldn't you exceed 72 cent rate? Well, it is a mathematical computation.

Exam. Hall: Suppose he had this 72 cent rate carrying an intermediate clause applicable over that route?

The Witness: It applies intermediate if the combination of locals exceeds that.

Q. (By Mr. Tolan): Therefore, to such towns as Salt Lake City, and Boise, for instance, the transcontinental ceiling would apply?

A. Yes.

Q. And then that statement that the Seattle combination applies to all points would not be correct, would it? [165]

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred Madsen.)

A. Well, that transcontinental rate from New Westminster to Utah points only applies via Spokane, and not via Seattle.

Q. So far as the Union Pacific is concerned. Do you know whether there is a rate that would apply by the Great Northern, Western Pacific, and Denver and Rio Grande?

A. I have not checked that.

Q. If they produced lower charges than that, would you amend your statement regarding the exhibit? A. I would show it as a max.

Q. Rather than the combination?

A. As a max.

Q. Your Exhibit 31, showing manufactured fertilizer rates,—do you maintain westbound rates on fertilizer lower than those shown eastbound from Seattle?

A. There may be some minor changes.

Q. You emphasize the word "minor".

A. I have it here.

Q. Let me ask you this question to expedite the thing. Do you know what the sulphate of ammonia rate is to Seattle from Salt Lake City, the reverse direction of the one that you have shown here?

A. That would be 45 and,—

Q. I think you will find the correct rate to be 49. On May 6, 1948, the correct rate is 49 cents. If I said the westbound rate was 49 cents on fertilizer, would you say that that [166] is a minor reduction under the 62 cent rate?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred Madsen.)

A. Well, it speaks for itself.

Q. Do you know the value of fertilizer that is moving in this eastbound direction from Seattle?

A. No, I don't.

Q. Do you know the value of the movement from Seattle to the towns that you have named?

A. Well, we had 14 cars during 1947.

Mr. Tolan: That is all.

Redirect Examination

Q. (By Mr. Tjossem): You made the statement in response to Mr. Tolan's questioning that there might be some minor differences comparing the rates westbound and eastbound. Do you know what the rate was on sulphate of ammonia from Salt Lake City to Seattle, I believe it was, on May 6, 1948? Do you know, or did you know when you answered the question? A. I have it here.

Q. Did you know when you answered him?

A. No, but I have it.

Recross Examination

Q. (By Mr. Tolan): What is the rate?

A. According to this, it is 45 cents from Utah to Seattle, westbound rate.

Q. Is it in effect today? A. Yes. [167]

Mr. Tjossem: I offer in evidence Defendants' Exhibits 30, 31 and 32.

Exam. Hall: They will be admitted.

Plaintiffs' Exhibit No. 2—(Continued)

(Defendants' Exhibits 30, 31 and 32, Witness Madsen, received in evidence.)

(Witness excused.)

Mr. Tjossem: That completes the case of the Defendants. The Defendants rest.

Exam. Hall: Do you have any rebuttal?

Mr. Tolan: No rebuttal.

Exam. Hall: Of course there will be a proposed report. And then we have the question of briefs. Off the record.

(Discussion off the record.)

Exam. Hall: Briefs will be due January 15th, 1949. That will close the hearing in this proceeding.

(Whereupon, at 7:06 p.m., November 10, 1948, hearing closed.)

* * * * *

Interstate Commerce Commission

Filed 7/12/49

No. 29974—Acme Peat Products, Ltd., et al., vs.
The Akron, Canton & Youngstown Railroad
Company, et al.

Submitted..... Decided.....

1. Rates on ground peat, in carloads, from points in Canada to various points in the United States not shown to have resulted in charges for the hauls within the United States that were unreasonable or otherwise unlawful.

Plaintiffs' Exhibit No. 2—(Continued)

2. Rates on the same commodity, in carloads, from the same points of origin to certain points in California not shown to be unreasonable or otherwise unlawful for the hauls within the United States.

3. Complaint dismissed.

Fred H. Tolan for complainants.

A. J. Clynch, R. Paul Tjossem, Charles W. Burkett, Jr., J. E. Lyons, and Harold G. Boggs for defendants.

REPORT PROPOSED BY GEORGE J. HALL
AND L. H. DISHMAN, EXAMINERS

Complainants¹, corporations of Canada, are producers of ground peat at certain points in British Columbia, Canada. By complaint originally received April 30, 1948, they allege that the rates² charged on numerous shipments of that commodity, in carloads, which moved during the period from

¹ Acme Peat Products, Alouette Peat Products, Atkins & Durbrow, which prior to January 8, 1948, operated under the name of B. C. Peat Company, Ltd., Coast Peat Company, Excelsior Peat Company, Lulu Island Peat Company, Northern Peat Moss Company, Pacific Peat Products, Richmond Peat Products, Shaffer-Haggart, Western Peat Company, Blundell Peat Company, and Byrne Road Peat Farms. All except the last two named are limited corporations.

² Rates are stated in amounts per 100 pounds, unless otherwise indicated and do not include increases authorized after January 1, 1947.

Plaintiffs' Exhibit No. 2—(Continued)

January 1, 1947, to March 29, 1948, from certain points³ in British Columbia, of which New Westminster located on the Great Northern Railway about 20 miles north of the boundary between Canada and the United States is representative, to various points in the United States were inapplicable, unreasonable, and unduly preferential and prejudicial. Complainants also allege that the rates from the origin points herein to certain points⁴ in northern California are, and for the future will be, unreasonable and unduly preferential and prejudicial. An informal complaint covering one carload of ground peat shipped January 28, 1947, from New Westminster to Los Angeles, Calif., and containing the same allegations as those considered herein, was filed by Pacific Peat Products, Ltd., May 26, 1947, and closed March 24, 1948, as not being susceptible of informal adjustment. The Commission is asked to award reparation on all shipments of record and to prescribe rates for the future to the aforementioned California points.

Complainants suggest that proportional rates, computed on a mileage pro rata basis, be prescribed for the hauls within the United States.

Complainants contend that the rates assailed, al-

³ Queensboro, New Westminster, South Fraser St., Pitt Meadows, Fraser St., and Vancouver.

⁴ San Francisco, Port Chicago, Fresno, Petaluma, West Petaluma, Santa Rosa, Oxford, Locke, Walnut Grove, Isleton, Santa Cruz, Terminous, Monterey, Lake Najella, Salinas, and Tres Pinos, which was abandoned as a station June 26, 1948.

Plaintiffs' Exhibit No. 2—(Continued)

though published pursuant to purported authority of the Commission's order of December 5, 1946, in *Increased Rates, Fares, and Charges, 1946*, 266 I.C.C. 537,⁵ did in fact exceed the rates authorized by that order. The sole issue complainants assert, is whether the defendants in publishing increases in their rates on ground peat observed the limitations in the Commission's findings and order in that proceeding.

In view of the fact that *Ex Parte No. 162* was a proceeding nationwide in scope, involving every commodity transported by rail, the Commission could only set forth in general terms how the increases it allowed should be applied. It stated with reference thereto at page 618 in the appendix as follows:

Basic freight rates, whether class or commodity, and charges, on the commodities hereinafter specified, may be increased in the amounts and in the manner set forth as to each commodity class or group. The commodity group numbers (or commodity class numbers) used in this appendix, and throughout the entire report and order, for convenience, are those specified in the order of division 4 of November 22, 1927, *In the Matter of Freight Commodity Statistics*, which was in effect at the date of the submission herein, although a new list of commodity classes with articles assigned thereto has been promulgated by order of division

⁵ Hereinafter termed *Ex Parte No. 162*.

Plaintiffs' Exhibit No. 2—(Continued)

l, September 24 and October 16, 1946, to become effective January 1, 1947. They are intended generally to cover the items customarily included by the carriers in their reports to the Commission under each numbered description, as of the date for the submission.

In the case of rates on Fertilizers, N.O.S.,⁶ Group 640, an increase of 20 percent, subject to a maximum of 6 cents, or \$1.20 per net ton, was authorized by the Commission in the above-mentioned proceeding. Although peat, ground or unground, *in* included in the group of commodities listed under Group 640, the carriers, in publishing rates as authorized in Ex Parte No. 162, published a 6-cent maximum increase in rates on peat when that commodity was carried in the tariffs in the fertilizer group, N.O.S., but in instances where it was not included in the tariffs as fertilizer, N.O.S., but under a separate commodity rate, the full 20 percent increase, authorized therein on all basic freight rates generally, was published. As the rates applying on peat from points in British Columbia to destinations in the United States were separate commodity rates they were, on January 1, 1947, made subject to the full 20 percent increase. The rates sought are the basic rates in effect January 1, 1947, increased in the same manner and to the same extent as the rates on fertilizers, N.O.S.

The matter of increases under Ex Parte No.

⁶Not otherwise specified.

Plaintiffs' Exhibit No. 2—(Continued)

162 was later given further consideration on representation that rates on peat from origins in eastern Canada to points in the United States east of the Mississippi River were on the fertilizer basis and were increased a maximum of only 6 cents as contrasted with the maximum increase of 20 percent in the rates applying from points in British Columbia herein assailed. As a result thereof, defendants modified their tariffs in the various rate territories, between December 1, 1947, and March 29, 1948, to reflect a maximum increase of 6 cents in the rates on peat. However, prior to March 29, 1948, when defendants amended their master increase tariff⁷ to show the 6-cent maximum increase applicable to rates on peat, they republished rates thereon from the considered origins to points in northern California, hereinbefore referred to, adding to the basic rates the full 20 percent increases, and withdrawing those rates from the master increase tariff. Those are the only rates now in effect assailed by complainants.

The ground peat herein considered, is produced from moss litter dug from peat bogs in British Columbia and dried by the so-called hydraulic process. There are two varieties of ground peat; the horticultural variety and the poultry litter variety. The only difference between the two varieties is that the former is more finely ground than the

⁷ Tariff of increased rates and charges No. X-162-A, Agent L. E. Kipp's I.C.C. A-3676, Supplement 19.

Plaintiffs' Exhibit No. 2—(Continued)

latter. Approximately 70 percent of the ground peat shipped by complainants to destinations in the United States is the horticultural variety. The principal consuming areas are California and the middle west, south and west of Chicago. It is shipped in bales weighing about 93 pounds per bale. Its approximate value is from \$1.75 to \$1.80 per bale.

Ground peat when mixed with soil adds only negligibly to the food value thereof. The actual effect of the mixing is the conditioning of the soil rather than the addition of food for plants. It helps the soil to retain moisture and has the effect of making adobe soil pliable and mellow. Peat holds water like a sponge. In 1929, one of the complainants herein, when attempting to obtain rates on peat lower than those applying on fertilizers, represented to certain defendants herein that this commodity was not in fact a fertilizer and that it was used extensively as poultry litter and for other purposes not in connection with the growing of plants, such as packing for certain vegetables. In view of the foregoing defendants are of the view that peat is not a fertilizer and that the rates thereon were properly increased the full 20 percent as authorized in Ex Parte No. 162 on basic freight rates generally.

Complainants contend that as peat is included in Commodity Group 640, previously referred to, defendants were not authorized by the order entered in Ex Parte No. 162 to increase the rates thereon

Plaintiffs' Exhibit No. 2—(Continued)

by amounts greater than the increases applied to the rates on fertilizers, N.O.S. Assuming that complainants are correct in their contention, it does not follow that the increased rates, complained of were thereby unreasonable or otherwise unlawful in violation of the Interstate Commerce Act. The findings of the Commission in that proceeding were permissive as indicated by finding 15, (266 I.C.C. 537, at page 617) as follows:

Rates and charges increased as herein permitted are not considered as prescribed rates, within the meaning of *Arizona Grocery Co. vs. Atchison T. & S. F. Ry. Co.*, 284 U.S. 370.

In *Wisconsin Mfts' Assn. vs. Ahnapee & W. Ry. Co.*, 272 I.C.C. 497, wherein a somewhat similar issue was involved, division 3 said at page 500:

One of the duties of defendants is to initiate rates. In publishing rates under permissive or mandatory orders of the Commission, it frequently occurs that the carriers propose other changes in rates not specifically authorized or required by the findings in the particular proceedings. Such rates are subject to protest and suspension if they are considered to be unlawful.

No protests were filed by the complainants herein when the increased rates were published by the carriers under authority of the findings in *Ex Parte* No. 162, or when the carriers republished rates on peat from the considered origins to points in northern California, whereby the 20 percent in-

Plaintiffs' Exhibit No. 2—(Continued)

increase was added to the basic rates and withdrawn from the master increase tariff.

Clearly the rates assailed were not inapplicable as complainants contend. The Commission has frequently found that where tariffs are tendered to, and accepted by it they became the only lawful rates applying to the commodities included therein, even though technically they should have been rejected upon tender. *Brown & Sons Lumber Co. vs. L. & N. R.R. Co.*, 37 I.C.C. 507. In *Kansas City Fuel Co. vs. Atchison, T. & S. F. Ry. Co.*, 210 I.C.C. 134, division 3 said at page 136: "A rate published in a tariff on file with the Commission even though in contravention of its order would still be the legal rate."

Other than showing that the rates assailed were increased by greater amounts than the rates on fertilizers, complainants offered no substantial evidence in support of their allegation of unreasonableness. They point out that in certain cases the Commission has held that carrier application of rates in excess of those authorized by it were unreasonable. In those cases, however, it was found that the basic rates to which the authorized increases applied were maximum reasonable rates. *Wisconsin Retail Lumbermen's Assn. vs. Ann Arbor R. Co.*, 241 I.C.C. 400. *Adams Lbr. Co. vs. Akron C. & Y. Ry. Co.*, 253 I.C.C. 179. There is nothing of record in the instant case to indicate that the basic rates on peat, established to meet competitive conditions, were maximum reasonable

Plaintiffs' Exhibit No. 2—(Continued)

rates. On the contrary, the evidence discloses that to California destinations, for example, that if the original rates established in 1937 and increased in 1938 had been subject to no voluntary reductions and had been increased by all general increases authorized by the Commission, they would have been substantially higher than the rates assailed. The new basic rates on peat to points in northern California, hereinbefore referred to, were published January 1, 1948, pursuant to the suggestion made in All Rail Commodity Rates Between Calif., Oreg. and Wash., 268 I.C.C. 515. In that proceeding the Commission permitted the rail carriers to increase a specified list of commodity rates by about 4 percent more than the rates resulting from application of Ex Parte No. 162 increases. It was stated therein at page 545 that the rail carriers might propose similar increases on their other class and commodity rates. As a matter of carrier policy, a similar increase was not made in the rates applying to points in southern California as those rates then would have exceeded the transcontinental rate to points in the middle northwest. The rate to San Francisco, for example, is now 8 cents lower than the rate to Los Angeles.

It is contended by complainants that the voluntary reduction by defendants of all the rates on peat, except those to points in northern California, subsequent to the dates of the shipments involved herein shows the prior rates were unreasonable and that reparation should be awarded. The Com-

Plaintiffs' Exhibit No. 2—(Continued)

mission, however, has frequently found that the voluntary reduction of rates does not of itself justify the conclusion that the pre-existing rates were unreasonable or afford a basis for reparation. *Providence Fruit & Produce Exch. vs. N. Y., N. H., and H. R. R. Co.*, 142 I.C.C. 179.

In support of the allegation of undue preference and prejudice, complainants assert that they ship peat to points in the United States east of Chicago in competition with producers of that commodity located at points in eastern Canada and in the eastern part of the United States and that during most of the year 1947 the full 20 percent increase was applied to their rates, whereas the rates from the alleged preferred points were increased a maximum of only 6 cents. To those consuming points, the distances from the origins herein average about 3,500 miles as compared with an average of only 1,000 miles from the alleged preferred points. In addition to the handicap of distance in reaching the eastern markets, the record shows that complainants encounter severe competition there by producers of peat substitutes, such as sugar cane products, straw and corn cobs. There was a change in rate relations when the *Ex Parte* No. 162 increases were published, but there is nothing of record to indicate that the rates were properly related before the change or improperly related thereafter. General declarations as to competition or injury, unsupported by evidentiary facts, and a mere showing of disparity of rates are not sufficient

Plaintiffs' Exhibit No. 2—(Continued)

for a finding of undue preference and prejudice. R. C. Williams & Co., Inc., vs. New York Central R. Co., 269 I.C.C. 297. Rheem Mfg. Co. vs. Chicago R. I. & P. Ry. Co., 273 I.C.C. 185. The evidence of record does not establish the existence of undue prejudice.

Upon this record the Commission should find that the rates assailed are not shown to have been, or to the points in California, hereinbefore named, to be, unreasonable or otherwise unlawful for the hauls within the United States. The complaint should be dismissed.

* * * * *

Interstate Commerce Commission

Filed 4/17/50

No. 29974¹—Acme Peat Products, Ltd., et al., vs. Akron, Canton & Youngstown Railroad Company, et al.

Submitted Nov. 17, 1949

Decided April 7, 1950

1. Increased rates on ground peat, in carloads, from points in British Columbia, Canada, to points in the United States, found to have resulted in charges for hauls within the United States that were unjust and unreasonable. Reparation awarded.

¹ This report also embraces No. 30260, Alouette Peat Products, Ltd. vs. The Atchison, Topeka and Santa Fe Railway Company.

Plaintiffs' Exhibit No. 2—(Continued)

2. Increased rates on like traffic to certain points in California found to result in charges for hauls within the United States that are unjust and unreasonable. Unauthorized increases ordered removed.

Fred H. Tolan for complainants.

A. J. Clynch, R. Paul Tjossem, Charles W. Burkett, Jr., J. E. Lyons, and Harold G. Boggs for defendants.

REPORT OF THE COMMISSION

Division 2, Commissioners Aitchison, Splawn, and Alldredge by Division 2:

Exceptions to the examiners' proposed report were filed by complainants, and we have heard the parties in oral argument. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not justified.

Complainants,² in No. 29974, Corporations of Canada, are producers of ground peat at certain points in British Columbia, Canada. By complaint

² Acme Peat Products, Alouette Peat Products, Atkins & Durbrow, which prior to January 8, 1948, operated under the name of B. C. Peat Company, Ltd., Coast Peat Company, Excelsior Peat Company, Lulu Island Peat Company, Northern Peat Moss Company, Pacific Peat Products, Richmond Peat Products, Shaffer-Haggart, Western Peat Company, Blundell Peat Company, and Byrne Road Peat Farms. All except the two last named are limited corporations.

Plaintiffs' Exhibit No. 2—(Continued)

originally received April 30, 1948, they allege that the rates charged on numerous shipments of that commodity, in carloads, which moved on and between January 1, 1947, and March 29, 1948, from certain points³ in British Columbia, of which New Westminster, on the line of the Great Northern Railway Company about 20 miles north of the boundary between Canada and the United States, is representative, to points in the United States, were inapplicable, unjust and unreasonable, and unduly preferential and prejudicial. Complainants also allege that the rates from these origins to certain points⁴ in northern California are and for the future will be, unjust and unreasonable, and unduly preferential and prejudicial. We are asked to award reparation and to prescribe lawful rates for the future to the northern California points.

Complainant in No. 30260, a corporation of Canada, filed its complaint on May 31, 1949. It contains the same allegations and prayer for relief, with respect to shipments of peat moving to points in the United States from Pitt Meadows, British Columbia, Canada, as are made in the complaint in No. 29974. By stipulation of the parties, that pro-

³ Queensboro, New Westminster, South Fraser St., Pitt Meadows, Fraser St., and Vancouver.

⁴ San Francisco, Port Chicago, Fresno, Petaluma, West Petaluma, Santa Rosa, Oxford, Locke, Walnut Grove, Isleton, Santa Cruz, Terminous, Monterey, Lake Najaella, Salinas, and Tres Pinos. The point last named was abandoned as a station on June 26, 1948.

Plaintiffs' Exhibit No. 2—(Continued)

ceeding has been submitted upon the record as made in No. 29974.

Complainants contend that increases in amounts exceeding 6 cents per 100 pounds in the rates assailed, although stated to be published pursuant to authority granted by the Commission on December 5, 1946, were and are in fact increases exceeding those so authorized. The sole issue, complainants assert, is whether the defendants in publishing increased rates on ground peat should have observed the amount of 6 cents as the maximum increase authorized for specified commodities.

The Commission set forth in general terms how the general increases authorized December 5, 1946, should be applied. In the appendix to the report, 266 I.C.C. at page 618, it stated:

Basic freight rates, whether class or commodity, and charges, on the commodities hereinafter specified, may be increased in the amounts and in the manner set forth as to each commodity class or group. The commodity group numbers (or commodity class numbers) used in this appendix, and throughout the entire report and order, for convenience, are those specified in the order of division 4 of November 22, 1927, In the Matter of Freight Commodity Statistics, which was in effect at the date of the submission herein, although a new list of commodity classes with articles assigned thereto has been promulgated by order of division 1, September 24 and October 16, 1946, to become effective January 1, 1947. They are intended

Plaintiffs' Exhibit No. 2—(Continued)

generally to cover the items customarily included by the carriers in their reports to the Commission under each numbered description, as of the date for the submission.

In the case of rates on fertilizers n.o.s.,⁵ group 640, an increase of 20 percent, subject to a maximum of 6 cents per 100 pounds or \$1.20 per net ton, was authorized. Although peat, ground or unground, is included in the group of commodities listed under group 640, the carriers, in publishing increased rates as authorized, published a 6-cent maximum increase in rates on peat only when that commodity was carried in the tariffs in the fertilizer group. In instances where a separate commodity rate was published for peat, the full 20 percent increase, authorized on basic freight rates generally, was published. As the rates applying on peat from points in British Columbia to destinations in the United States were separate commodity rates, they were, on January 1, 1947, made subject to the full 20 percent increase. The rates sought are the basic rates in effect prior to January 1, 1947, increased in the manner that rates on fertilizers were increased.

The carriers gave the matter of increases further consideration on representations that rates on peat from origins in eastern Canada to points in the United States east of the Mississippi River were on the fertilizer basis and were increased a maximum

⁵ Not otherwise specified.

Plaintiffs' Exhibit No. 2—(Continued)

of 6 cents. As a result thereof, defendants reduced the transcontinental rates on peat between and on December 1, 1947, and March 29, 1948, to reflect a maximum increase of 6 cents. However, prior to March 29, 1948, when defendants amended their master tariff⁶ to show the 6-cent maximum increase applicable to rates on peat, they republished rates thereon from the origins in British Columbia to points in northern California hereinbefore referred to, adding to the basic rates the full 20 percent increase, and withdrawing those rates from the application of the master tariff. Those are the only rates now in effect that are assailed by complainants.

The ground peat herein considered, is produced from moss litter dug from peat bogs in British Columbia and dried. There are two varieties of ground peat; the horticultural variety and the poultry litter variety. The only difference between the two varieties is that the former is more finely ground than the latter. Approximately 70 percent of the ground peat shipped by complainants to destinations in the United States is the horticultural variety. The principal consuming areas are California and the Middle West, south and west of Chicago. It is shipped in bales weighing about 93 pounds per bale. Its approximate value is from \$1.75 to \$1.80 per bale.

⁶ Tariff of increased rates and charges No. X-162-A, Agent L. E. Kipp's I.C.C. A-3676, Supplement 19.

Plaintiffs' Exhibit No. 2—(Continued)

Ground peat when mixed with soil adds only negligibly to the food value thereof. The actual effect of the mixing is the conditioning of the soil rather than the addition of food for plants. It helps the soil to retain moisture and has the effect of making adobe soil pliable and mellow. Peat holds water like a sponge. In 1929, one of the complainants herein, when attempting to obtain rates on peat lower than those applying on fertilizers, represented to certain defendants herein that this commodity was not in fact a fertilizer and that it was used extensively as poultry litter and for other purposes not in connection with the growing of plants, such as packing for certain vegetables. In view of the foregoing, defendants are of the view that peat is not a fertilizer and that therefore the rates thereon were properly increased the full 20 percent, without exception.

Complainant's contention that the rates assailed were not applicable has no merit. Where tariffs are tendered to and accepted by the Commission, the rates therein become applicable, even though technically they should have been rejected upon tender. *Brown & Sons Lumber Co. vs. Louisville & N. R. R. Co.*, 37 I.C.C. 507. In *Kansas City Fuel Oil Co. vs. Atchison, T. & S. F. Ry. Co.*, 210 I.C.C. 134, division 3 said at page 136: "A rate published in a tariff on file with the Commission even though in contravention of its order would still be the legal rate."

Defendants were not authorized to increase the rates on commodities embraced in group 640 by

Plaintiffs' Exhibit No. 2—(Continued)

amounts exceeding 6 cents per 100 pounds. As ground peat was specifically included in that group, such increases in the rates thereon were not within the authority given. The schedules containing the unauthorized increases, published on short notice, were not received by complainants in time for protest and suspension.

Defendants rely upon evidence tending to show that the basic rates on peat were not maximum reasonable rates. To California destinations, for example, if the original rates established in 1937 and increased in 1938 had not been voluntarily reduced and had been subjected to all authorized general increases, they would have been substantially higher than the rates assailed. The new basic rates on peat to points in northern California, hereinbefore referred to, were published January 1, 1948, pursuant to a suggestion made in *All Rail Commodity Rates Between Calif., Oreg., and Wash.*, 268 I.C.C. 515. In that proceeding the Commission permitted the rail carriers to increase rates on a specified list of commodities by about 4 percent more than the rates resulting from application of the increases authorized December 5, 1946. The rates were affected by competition with transportation by water. It was stated therein, at page 545, that the rail carriers might propose similar increases on their other class and commodity rates. As a matter of carrier policy, a similar increase was not made in the rates applying to points in southern California as those rates then would have exceeded the trans-

Plaintiffs' Exhibit No. 2—(Continued)

continental rates to points in the Middle Northwest. Commodity rates to the Chicago, Ill., area and destinations west thereof were published effective April 2, 1936, because of competition with peat imported from Sweden and Germany, and in 1940 rates to other destinations were graded with relation to the rate to the Chicago area. It is also indicated that competition with peat from Wisconsin, Michigan and other eastern States affects the trans-continental rate level. An increase of 5 cents per 100 pounds on December 24, 1936, was removed effective March 1, 1937.

The evidence introduced by defendants in an attempt to establish the reasonableness of the assailed rates as increased misses the crux of the issue here presented. These rates were increased by defendants under color of approval by this Commission in a general revenue proceeding in which authority was sought, because of an emergency, to depart from the usual method of rate publication and to reduce the statutory filing time for the tariffs. The latter requests were granted and increases in the general body of rates, designed to afford additional revenue to the carriers, were authorized, subject to certain specific holddowns in rates which were prescribed for the purpose of avoiding unnecessary disturbances in rate and market relations. The reasonableness of the increases to be made in the rates on peat was there definitely determined. The proper course for defendants to have taken, if they were dissatisfied with the maximum to which the in-

Plaintiffs' Exhibit No. 2—(Continued)

increases in the rates on peat authorized were made subject, would have been to file a petition for reconsideration or rehearing in the proceeding in which it was prescribed. They had no right to proceed otherwise.

In publishing the rates on peat here considered, however, defendants disregarded the maximum which the Commission had prescribed in connection with its approval of a percentage increase. As these increases were named in tariffs which became effective on short notice, complainants were prevented from exercising the statutory right that otherwise would have been available to enter protest before the increased rates took effect. It is our opinion that the complainants, who paid the unauthorized increases, are entitled, under the Interstate Commerce Act, to be placed in the same situation in which they would have been had the defendant carriers complied with our order. Section 1 requires that rates and charges be both just and reasonable. As the Commission said in *Reparation as Relating to Increase of Rates*, 68 I.C.C. 5, 6, decided March 14, 1922:

We have often recognized the principle that the words "just and reasonable" imply the application of good judgment and fairness, of common sense and a sense of justice, to the facts of record. The words "just and reasonable" are not fixed unalterable mathematical terms. *Advances in Rates on Coal by the C. & O. Ry. Co.*, 22 I.C.C. 604.

In the instant proceeding, the collection by de-

Plaintiffs' Exhibit No. 2—(Continued)

defendants of charges which included increases in excess of those authorized by the Commission clearly resulted in unjust enrichment of defendants at complainants' expense. It follows that reparation on past shipments to the extent of this unjust enrichment is warranted, and that a reduction to the same extent in the assailed rates now maintained to points in northern California which include the unauthorized increases should be required.

In support of the allegation of undue preference and prejudice, complainants assert that they ship peat to points in the United States east of Chicago in competition with producers of that commodity located at points in eastern Canada and in the eastern part of the United States; that during most of the year 1947 the full 20 percent increase was applied to their rates, whereas the rates from the alleged preferred points were increased a maximum of 6 cents; and that their prices could not be correspondingly increased. To those consuming points, the distances from the origins herein average about 3,500 miles, as compared with an average of only 1,000 miles from the alleged preferred points. Complainants encounter competition also with peat substitutes, such as sugar cane products, straw, corn cobs and ground bark. The differences between the assailed and alleged preferential rates are not shown to have been or to be of a character justifying a finding that certain defendants having effective control of the rates subjected or subject complainants to undue prejudice. Compliance with our

Plaintiffs' Exhibit No. 2—(Continued)

order will remove cause for complaint.

We find that the assailed rates were applicable, but that they resulted in charges for hauls within the United States that were unjust and unreasonable to the extent that they included increases herein found not authorized.

We further find that the assailed rates to points in northern California result in charges for hauls within the United States that are and for the future will be unjust and unreasonable to the extent that they include or may include increases herein found not authorized.

We further find that complainants made shipments as described and paid the charges thereon at the rates herein found unjust and unreasonable, and that they were damaged thereby and are entitled to reparation in the amount of the difference between the charges paid and those herein found just and reasonable, with interest. Complainants should comply with rule 100 of the General Rules of Practice.

An order will be entered requiring the removal of unauthorized increases in the rates to points in California.

ORDER

At a Session of the Interstate Commerce Commission, Division 2, held at its office in Washington, D. C., on the 7th day of April A.D. 1950.

No. 29974—Acme Peat Products, Ltd., et al., vs.

Plaintiffs' Exhibit No. 2—(Continued)

The Akron, Canton & Youngstown Railroad Company, et al.

No. 30260—Alouette Peat Products, Ltd., vs. The Atchison, Topeka and Santa Fe Railway Company, et al.

These proceedings being at issue upon complaint and answers on file and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the defendants named in the complaints, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before July 18, 1950, and thereafter to abstain from publishing, demanding, or collecting for the transportation within the United States of the traffic referred to in the next succeeding paragraph hereof rates exceeding those found just and reasonable in the report made a part hereof.

It is further ordered, That the said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish on or before July 18, 1950, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce

Plaintiffs' Exhibit No. 2—(Continued)

Act, and thereafter to maintain and apply to the transportation within the United States of ground peat, in carloads, from points in British Columbia, Canada, to points in northern California named in the report made a part hereof, rates which shall not exceed those found just and reasonable in said report.

By the Commission, division 2.

[Seal] W. P. Bartel, Secretary

* * * * *

Filed 6/22/50

Before the Interstate Commerce Commission

No. 29974—Acme Peat Products, Ltd., et al., Complainants, vs. The Akron, Canton & Youngstown Railroad Company, et al., Defendants.

No. 30260—Alouette Peat Products, Ltd., Complainant, vs. The Atchison, Topeka and Santa Fe Railway Company, et al., Defendants.

PETITION OF DEFENDANTS FOR RECONSIDERATION BY THE ENTIRE COMMISSION AND FOR ARGUMENT

The defendant railway companies respectfully petition this Commission to reopen these proceedings for reconsideration by the entire Commission, and to accord oral argument.

By petition dated May 26, 1950, the defendants

Plaintiffs' Exhibit No. 2—(Continued)

requested that the effective date of the Order of Division 2 dated April 7, 1950, be postponed, and we are now advised by the Chief Examiner of the Commission that the effective date of the Order has been postponed to September 29, 1950.

The defendants are prompted to file this petition, as we respectfully submit Division 2 erred in entering its Order of April 7, 1950, in the following particulars:

Division 2 erred:

(1) in concluding that the carriers in publishing the rates condemned by Division 2 did so in disregard of the maximums which the Commission prescribed in *Ex parte* 162, 266 I.C.C. 537;

(2) in awarding reparations without finding that the rates condemned are excessive or otherwise discriminatory or prejudicial;

(3) in asserting the authority to prescribe through rates from Canada to destinations in Northern California, as this Commission lacks authority to prescribe such rates;

(4) in asserting the authority to award reparations to the complainants when the complainants failed to show that they were in any way damaged by the collection of the charges ordered refunded.

The Order of Division 2 is contrary to numerous prior decisions of this Commission, and is contrary to recent decisions by Division 3 reaffirming the prior decisions of this Commission.

We therefore respectfully except to the following statements of Division 2:

Plaintiffs' Exhibit No. 2—(Continued)

1. "Defendants were not authorized to increase the rates on commodities embraced in group 640 by amounts exceeding 6 cents per 100 pounds" (Sheet 5).
2. "The evidence introduced by defendants in an attempt to establish the reasonableness of the assailed rates as increased misses the crux of the issue here presented. These rates were increased by defendants under color of approval by this Commission in a general revenue proceeding in which authority was sought, because of an emergency, to depart from the usual method of rate publication and to reduce the statutory filing time for the tariffs" (Sheet 7).
3. "The reasonableness of the increases to be made in the rates on peat was there definitely determined. The proper course for defendants to have taken, if they were dissatisfied with the maximum to which the increases in the rates on peat authorized were made subject, would have been to file a petition for reconsideration or rehearing in the proceeding in which it was prescribed. They had no right to proceed otherwise" (Sheet 7).
4. "It is our opinion that the complainants, who paid the unauthorized increases, are entitled, under the Interstate Commerce Act, to be placed in the same situation in which they would have been had the defendant carriers complied with our order. Section 1 requires that rates and charges be both just and reasonable. As the Commission said in Re-

Plaintiffs' Exhibit No. 2—(Continued)

paration as Relating to Increase of Rates, 68 I.C.C. 5, 6, decided March 14, 1922:

“‘We have often recognized the principle that the words “just and reasonable” imply the application of good judgment and fairness, of common sense and a sense of justice, to the facts of record. The words “just and reasonable” are not fixed unalterable mathematical terms. Advances in Rates on Coal by the C. & O. Ry. Co., 22 I.C.C. 604.’

“In the instant proceeding, the collection by defendants of charges which included increases in excess of those authorized by the Commission clearly resulted in unjust enrichment of defendants at complainants' expense. It follows that reparation on past shipments to the extent of this unjust enrichment is warranted, and that a reduction to the same extent in the assailed rates now maintained to points in northern California which include the unauthorized increases should be required.” (Sheets 7 and 8).

The defendants also except to the conclusions of the Division that the complainants are entitled to reparations, and that the rates assailed applying from British Columbia origins to Northern California are unlawful and should be cancelled.

Statement of the Case

In our opening brief in this proceedings we made a detailed statement of the case, and Division 2 has accurately set forth the issues and the factual matters appearing of record, and we will not bur-

Plaintiffs' Exhibit No. 2—(Continued)

len our Petition by again setting forth the case in detail.

Division 2 accurately states on Sheet 3 that, "The sole issue, complainants assert, is whether the defendants in publishing increased rates on ground peat should have observed the amount of 6 cents as the maximum increase authorized for specified commodities."

The complainants have never asserted in this proceedings that the rates assailed were excessively high, and their only complaint with respect to the reasonableness of the rates is that the defendants were not authorized by the Commission's order in Ex parte 162 to increase the rates on peat to the full extent of 20 per cent, and were required to limit the increases to 6 cents per 100 pounds. There has been no claim that the assailed rates are excessive, nor can there be, as the record demonstrates that the assailed rates are low. Had the defendants voluntarily initiated the assailed rates on statutory notice, their level is such that we feel we can state without fear of contradiction that had the complainants protested the schedules on the grounds that the rates therein named were excessively high or were otherwise unlawful, the Commission would have rejected the protest and permitted the rates to take effect on statutory notice. We also believe we can assert without fear of contradiction that had there been no basis for contending that the carriers had violated the Commission's order in Ex parte

Plaintiffs' Exhibit No. 2—(Continued)

162, this complaint would never have been filed.

The issue tendered to Division 2 by these complainants and which is now before this Commission, is simply this: Can the Commission, and will the Commission, condemn rates and award reparations when no contention is made that the rates are excessively high and no attack is made on the level of the rates as such, and when the sole contention of the complainants is that the carriers were not authorized to publish the assailed rates? Division 2 answered Yes.

Division 2 concluded that the defendants were not authorized by the Commission to publish the rates here assailed, and because of this, and this alone, say that the carriers in collecting the alleged unauthorized rates were unjustly enriched at the expense of the complainants. The Division assumes that the carriers were enriched and that the claimed enrichment was unjust, without giving any consideration as to whether the charges collected were excessive or exceeded a fair charge for the service rendered by the carriers, or the value of these services to these complainants. The complainants produced no evidence to show that the charges were excessive, and the undisputed evidence of record demonstrates that the assailed rates are low. Division 2 did not find and could not find that the assailed rates were excessive or in violation of Sections 2 and 3, and consequently should have dismissed the complaint.

Plaintiffs' Exhibit No. 2—(Continued)

The Defendants Did Not Violate the Order of the Commission in Ex Parte 162 in Publishing the Assailed Rates.

Division 2 in its report has accurately summarized the action taken by the defendants in publishing the assailed rates following the effective date of the Commission's order in Ex parte 162. It is the position of Division 2 that from the language quoted in their report from the Commission's decision in Ex parte 162 at page 618 set forth on Sheet 3 of the Order herein, that the defendants were not permitted to deviate from the commodity grouping therein specified, and if a commodity was reported in a commodity grouping and the increases authorized as to that commodity grouping were subject to a maximum increase, the carriers could not publish any increase as to any commodity higher than the maximum imposed.

We are unable to agree with Division 2 that their conclusion is proper in light of the language used by the Commission. Had the Commission intended that the carriers were not to deviate from the maximums imposed in accordance with the commodity groupings, and that the increases permitted by the order in Ex parte 162 were to be uniformly and without exception applied to the commodities as they fall within the statistical grouping, we submit the Commission should not have included the last sentence set forth in the quoted paragraph. That sentence reads as follows:

Plaintiffs' Exhibit No. 2—(Continued)

"They are intended generally to cover the items customarily included by the carriers in their reports to the Commission under each numbered description, as of the date for the submission."

The word "they" obviously refers to the increases permitted by the Order; hence by this quoted sentence the Commission stated that the increases permitted were intended generally to cover the items customarily included by the carriers in their reports. Had the quoted sentence not been included in the paragraph, it would have been completely clear that the Commission intended that there would be no deviation from the statistical grouping, and if a given commodity fell within a grouping as to which the Commission imposed a maximum increase, the maximum increase would apply and there would be no excuse for having increased a commodity beyond the maximum permitted. We submit, therefore, that had the Commission intended the result now stated by Division 2, it could have unequivocally stated this requirement by the deletion from the paragraph of the quoted sentence.

In this connection we would like to point out that it was not the duty of the defendants to ascertain from the language of the Commission what was in the mind of the authors of the order when they included the quoted paragraph from the Commission's report in Ex parte 162. It can only be that it was the duty of the defendants to fairly interpret the language of the Commission, and if the interpretation placed on the language is reason-

Plaintiffs' Exhibit No. 2—(Continued)

able and fair, it cannot be said that the carriers in adopting a course of conduct pursuant to their interpretation acted in violation of the order.

We submit it is fair to conclude from the language in the quoted paragraph that there would be instances where the carriers would and should deviate from the statistical grouping of commodities in applying the increases authorized. It would appear to us that if this were not so, the Commission would not have included the last sentence in the paragraph. Certainly by inserting the last sentence of the paragraph the Commission stated that the increases permitted were to generally apply to the commodities as grouped for statistical purposes. The use of the word "generally" imports the existence of exceptions.

The Georgia court, in construing a statute providing that an instrument under seal generally imports a consideration, in concluding that by the use of the word "generally" in the statute the framers indicated that there would be exceptions to the general rule and permitted a showing that the contract even though under seal was without consideration, stated:

"In the absence of binding authority, therefore, to the contrary, we must believe that, by the use of the word 'generally' in the Code section, it was at least intended to provide for exceptions from the general rule which conclusively presumes a consideration where an instrument is executed under seal * * *." *Sims vs. Scheussler*, 64 S.E. 99, at 102.

Plaintiffs' Exhibit No. 2—(Continued)

It is not here contended that the defendants did not generally apply the Commission's order in Ex parte 162. There is no dispute as to what action was taken by the carriers with respect to publishing increases which resulted in the assailed rates, and Division 2 has accurately described the action taken by the carriers, which was that when peat moss was carried in the tariffs under the fertilizer grouping, the increases applying on these rates were limited to 6 cents per 100 pounds, and when peat moss appeared in the tariffs as a separate named commodity it was given a full 20 per cent increase.

We submit that the defendants not only acted under color of authority in publishing the assailed rates, but were in fact authorized to increase the rates in the manner in which they did.

The Defendants' Action, Even If Wrongful, Does
Not Entitle Complainants To Relief.

If we assume that Division 2 is correct and that it can be properly found that the carriers in increasing the rates in the manner in which they did were only acting under color of right and were not authorized to increase the rates to the full extent of 20 per cent, as the Commission has consistently pointed out, this fact, if it be the fact, will not in itself condemn the rates.

Division 2 admits as it must, see Sheet 5, that the rates here assailed are the applicable rates and were the only rates that could be applied to the movements here in question; that where tariffs are

Plaintiffs' Exhibit No. 2—(Continued)

tendered and accepted by the Commission, the rates named become applicable even though technically the tariff should have been rejected. The cases cited by Division 2 sustain their statement to this effect.

In the case of *Greene Cananea Copper Co. vs. Director General*, 80 I.C.C. 121, the Commission said:

“Complainant urges further that these rates were unlawful because not made in accord with the intention of General Order No. 28 and other instructions issued by the director general prior to June 25, 1918. In *Citizens Coal Mining Co. vs. Director General*, 66 I.C.C. 271, we said ‘The controlling fact to be determined is not whether the rate was increased in strict compliance with the terms of the intention of General Order No. 28, but whether the resulting rate was unreasonable or otherwise unlawful’.”

And in *Increased Rates, 1920*, 58 I.C.C. 220, the Commission stated:

“No such authority was granted. Therefore, in making the increases in question effective upon less than statutory notice, defendants failed to observe the provisions of section 6 of the interstate commerce act, but as we accepted supplement No. 4 for filing, the rates named therein became the only lawful rates which could have been applied on the traffic in question,” citing *Brown & Sons Lumber Co. vs. L. & N.R.R. Co.*, 37 I.C.C. 507.

On the same issue as is presented here, Division 3 in *Wisconsin Mfrs. Assn. vs. Ahnapee & W. Ry.*

Plaintiffs' Exhibit No. 2—(Continued)

Co., 272 I.C.C. 497, rejected the doctrine that the fact rates are not authorized would in itself condemn the rates. In that case it was contended, as is contended here, that the sole issue was whether the defendant carriers in publishing increases of rates in their tariffs 162 and 162-A observed the limitations of the Commission's findings and order in *Ex parte* 162, and Division 3 said that it could be assumed that the complainant was correct in its contention, and having found that the rates were not unreasonable or otherwise unlawful dismissed the complaint.

In *Barshop vs. A. T. & S. F. Ry., et al.*, 277 I.C.C. 17, Division 3, in rejecting a similar contention, stated:

"Unreasonableness may not be based upon what the carriers did when they were complying with the Commission's findings and orders. In the absence of other evidence tending to show unreasonableness, such as volume of movement, value, or ton-mile and car-mile earnings, this record will not support a finding that the applicable rates exceeded or exceed the maximum limit of reasonableness."

Division 3, in so holding in the two cited cases, has followed the consistent prior holdings of the Commission. The Commission has on numerous occasions held that the reasonableness of rates charged, and not strict conformity with the prescribed method of making percentage increases or reductions, is the controlling consideration. *New York Stable Manure Co. vs. Director General*, 93 I.C.C.

Plaintiffs' Exhibit No. 2—(Continued)

349, citing *Anaconda Copper Mining Co. vs. Director General*, 57 I.C.C. 723, and *Sprague Tire & Rubber Co. vs. Director General*, 80 I.C.C. 285. See also, *American Farm Bureau Federation vs. Aberdeen & R. R. Co.*, 80 I.C.C. 232; *Endicott-Johnson Corp. vs. Erie R. Co.*, 73 I.C.C. 562; *Louisville Fire Brick Works vs. Director General*, 85 I.C.C. 457.

The Commission has also consistently held that when a rate is attacked as unreasonable, the primary question for determination is the reasonableness of the level of the rate charged and not the particular basis on which it was constructed. *Sligo Furnace Co. vs. Chicago & N. W. Ry. Co.*, 74 I.C.C. 463; *Boston Wool Trade Assn. vs. Director General*, 78 I.C.C. 341.

Under the Facts Shown the Commission Cannot Award Reparation.

We do not concede that the carriers acted wrongfully. However, if it be conceded that the carriers acted wrongfully in publishing a full 20 per cent increase on the rates here assailed applying on the movements of peat moss, it does not follow that as a consequence of this wrongful act that these complainants were damaged, or that the amount of their damage is the difference between applying a 6-cent maximum to the rates and the rates which resulted from applying a 20 per cent increase. The complainants here are seeking reparation and they premise their claim on their contention that the carriers did not have authority to publish the in-

Plaintiffs' Exhibit No. 2—(Continued)

creases which were applied. Whether the carriers had the authority to publish the rates is beside the point. Unless it can be said, and on this record no such finding can be made, that as a result of the claimed unlawful act the complainants were required to pay an unreasonable charge in the sense that the charge assessed was more than a fair charge for the service rendered, the complainants were not damaged. If the complainants are not damaged, they are not entitled to reparation.

We concede that under the doctrine as announced by the Supreme Court in *Southern P. Co. vs. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 62 L.ed. 451, a complainant need not show an actual pecuniary loss in order to show damage when the freight charges are found to be excessive under Section 1, and that the measure of this damage is the amount of the excess exacted by the carriers. But this is not the case made here by these complainants. They have not contended, and Division 2 did not find, that as a result of the claimed unlawful act of the carriers these complainants were required to pay an excessive charge for the service rendered. We cannot agree with Division 2 that, "The evidence introduced by defendants in an attempt to establish the reasonableness of the assailed rates as increased misses the crux of the issue here presented" (Sheet 7), for unless the Commission can find from the evidence introduced that as a result of the action of these defendants, whether authorized or not, the rates which the complainants were required to pay

Plaintiffs' Exhibit No. 2—(Continued)

were excessive, the complainants have failed to prove any damage as a result of the claimed wrongful act, and there is no basis on which this Commission can award the payment of damages.

In passing it should be noted that if, as claimed, the carriers were not authorized to publish the full 20 per cent increase on the rates here assailed in carrying out the order of the Commission in Ex parte 162, as correctly pointed out by Division 2, the most that has happened to these complainants is that they were not given an opportunity to protest the rates prior to the effective date; and we again submit that unless these complainants can show that they were damaged thereby, this Commission does not have authority to grant reparation.

We believe that it is fundamental, as pointed out by the Supreme Court in the early case of *Parsons vs. Chicago & N.W.R. Co.*, 167 U.S. 447, 42 L.ed. 231, that—

“The only right of recovery given by the Interstate Commerce Act to the individual is to the ‘person or persons injured thereby, for the full amount of damages sustained in consequence of any of the violations of the provisions of this act.’ So, before any party can recover under the act he must show, not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.”

The quoted language was approved by the Supreme Court in the case of *Pennsylvania R. Co. vs.*

Plaintiffs' Exhibit No. 2—(Continued)

International Coal Min. Co., 230 U.S. 185, 57 L.ed. 1446, and the court in the cited case continued:

"Congress has not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what, though called damages, would really be a penalty, in addition to the penalty payable to the government."

The Supreme Court in *Louisville & N. R. Co. vs. Sloss-Sheffield S. & I. Co.*, 269 U.S. 217, 70 L.ed. 242, points out that it is not the claimed unjust enrichment of the carriers that gives rise to damages under Section 1; the court said:

"The liability in the case at bar arises out of the wrongful exaction from the shipper, not out of the unlawful receipt or unjust enrichment by the carrier."

In the cited case it was conceded that the charges exacted by the carriers were excessive, and it was contended that since the shippers had been able to pass the charges on to other parties, they were not damaged.

We do not contend that these complainants were able to pass any of the charges on to other parties. It is our contention that the complainants have not shown the charges to be excessive.

In *Davis vs. Portland Seed Company*, 264 U.S. 403, 68 L.ed. 762, the court concludes that when all that the complainants show is that a rate was published in violation of Section 4, such showing does not entitle the complainants to reparation under the Interstate Commerce Act, in the absence of

Plaintiffs' Exhibit No. 2—(Continued)

proof that they were in fact damaged by this action of the carriers. It is clearly indicated by this case that until it is found that the unlawful rate was unreasonable, in the sense that the complaining shippers were required to pay in excess of a fair charge for the service received, they are not entitled to damages under the Interstate Commerce Act.

The Supreme Court has arrived at the same conclusion when this Commission had found that the rates assailed were in violation of Section 1. In *Great Northern R. Co. vs. Sullivan*, 294 U.S. 458, 79 L.ed. 992, the Supreme Court summarized the action of the Commission as follows:

"The commission found the American proportionals to be unjust and unreasonable so far as they exceed specified maxima which it made applicable in lieu of these assailed. It made no finding concerning the reasonableness of the Canadian proportionals or of the combination through rates."

The Court commented on this fact as follows:

"The Great Northern was by the Act required to file tariffs establishing reasonable proportionals to constitute and to be kept in force as factors in the combination through rates applicable to plaintiff's shipments. Its failure to specify just and reasonable charges was a violation of the Act. And, if injured thereby, plaintiff is entitled to recover the damages sustained in consequence of such failure." (Emphasis supplied)

Plaintiffs' Exhibit No. 2—(Continued)

The court concluded:

"But the commission may not order or permit payment of damages by way of reparation without finding that the amount of the charge was unjust and unreasonable."

The court also stated:

"The shipper's only interest is that the charge shall be reasonable as a whole. It follows that retention by the defendant of an undue proportion of just and reasonable charges did not damage plaintiff."

It is clear from the cited case that the court in using the phrases, "unjust and unreasonable," and "reasonable charges," meant that a charge that is unjust and unreasonable or exceeded a reasonable charge is a charge that requires the shippers to pay an excessive rate, or one that is higher than should have been received in light of the value of the services rendered by the carriers and received by the shippers.

The opinions which we have cited of the Supreme Court clearly demonstrate that before this Commission has authority to award reparations under Section 1, it must find that the level of the assailed rate is unreasonable, not that the action of the carriers in publishing the rate was unreasonable. Since it has been clearly demonstrated by this record that the level of the rates here assailed does not exceed what can be fairly charged for the services rendered and received, and since there is no showing that the rates are otherwise unlawful,

Plaintiffs' Exhibit No. 2—(Continued)

the complainants are not entitled to reparations, and the rates condemned from British Columbia origins to Northern California are not shown to be in violation of the Interstate Commerce Act, and the complaint should be dismissed.

The Commission Lacks Jurisdiction to Prescribe Any Future Rates From Origins in Canada to Destinations in Northern California.

The Commission's order with respect to the establishment of rates for the future reads as follows:

"It is further ordered, That the said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish on or before July 18, 1950, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the transportation within the United States of ground peat, in carloads, from points in British Columbia, Canada, to points in northern California named in the report made a part hereof, rates which shall not exceed those found just and reasonable in said report." (Emphasis supplied)

The only rates to northern California destinations that were placed in issue in this proceeding are joint, through, single-factor rates from the involved origins in British Columbia, Canada. Neither are any rates from the international border in issue,

Plaintiffs' Exhibit No. 2—(Continued)

nor has the Commission in its report prescribed as just and reasonable any rates from the border. Consequently, the only way defendants could comply with the Commission's order would be to publish joint, through, single-factor rates from the involved origins in British Columbia to the involved destinations in California. Although the Commission may have jurisdiction to award reparation with respect to through international joint rates under certain circumstances, and although the Commission may have power to require carriers to cease and desist from participating in such rates, it cannot require either the establishment or the maintenance of any joint through rates from points in Canada to points in the United States. This is well settled. In *Lewis-Simas-Jones Co. vs. Southern Pacific Company* (1931) 283 U.S. 654, 660, the United States Supreme Court said that the Interstate Commerce Act "does not empower the Commission to prescribe or regulate" joint, through international rates. This principle was applied by the Commission in *Consolidated Stone Cases* (1934) 200 I.C.C. 65, in which complainant assailed joint rates on natural and cast stone from certain origins in the United States to destinations in Canada. The Commission held with respect to these rates (pp. 113-114):

"It would appear that the rates to points in Canada are as much in need of revision as the rates within the United States. However, we do not have jurisdiction to prescribe joint rates for future

Plaintiffs' Exhibit No. 2—(Continued)

application from points in the United States to points in Canada, and the only method open to us of preventing the application to such transportation of joint rates which are found to be unlawful under the act is to require the lines of the United States to discontinue their concurrence therein."

The Commission's unequivocal recognition of this principle is also reflected in its following statements:

"* * * It is well settled that we are without jurisdiction to require the establishment of international joint rates."

Amsden vs. Canadian National Rys. (1931) 176 I.C.C. 259, 260.

"* * * It is well settled that the Commission does not have authority to prescribe rates for the future on traffic from a point in the United States to a point in Canada."

Animal Trap Co. of America vs. New York Cent. R. Co. (1938) 229 I.C.C. 546, 547.

"* * * It is well settled that the Commission does not have authority to prescribe through international rates for the future or to require United States carriers to participate in such rates."

Carstens Packing Co. vs. Great Northern Ry. Co. (1945) 264 I.C.C. 164, 170.

Conclusion

Not only does the order of Division 2 in this proceeding overrule a long line of prior decisions by this Commission, it is in direct conflict with the

Plaintiffs' Exhibit No. 2—(Continued)

recent decisions of Division 3. Because of this we respectfully submit our petition for reopening, reconsideration and oral argument before the entire Commission should be granted, and the Commission should, on further reconsideration, reverse the Order of Division 2 and conclude that under the facts shown of record that these complainants are not damaged, that the Commission does not have authority to award reparations, and that none of the assailed rates are shown to be unlawful.

Respectfully submitted,

L. W. Hobbs,
Thos. H. Maguire,
Dean H. Eastman,
J. E. Lyons,
C. W. Burkett, Jr.,
R. Paul Tjossem,
Attorneys for Defendants

Dated at Seattle, Washington, this 20th day of June, 1950.

Certificate of Service attached.

* * * * *

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 7th day of January A.D. 1952.

No. 29974—Acme Peat Products, Ltd., et al., vs. Akron, Canton & Youngstown Railroad Company, et al.

Plaintiffs' Exhibit No. 2—(Continued)

No. 30260—Alouette Peat Products, Ltd., vs. The Atchison, Topeka and Santa Fe Railway Company.

Upon consideration of the record in the above-entitled proceedings and of defendants' petition for reconsideration by the entire Commission and for oral argument; and it appearing that the grounds relied upon and set forth in said petition do not constitute good and sufficient cause to warrant granting the request:

It is ordered, That said petition be, and it is hereby, denied.

By the Commission.

[Seal]

W. P. Bartel, Secretary

* * * * *

ORDER

INTERSTATE COMMERCE COMMISSION

No. 29974

ACME PEAT PRODUCTS, LTD., ET AL.

v.

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY ET AL.

No. 30260

ALOUETTE PEAT PRODUCTS, LTD.

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY

THE MATTER OF AWARDING REPARATION BASED ON RULE-100 STATEMENTS FILED HEREIN

PRESENT: CHARLES D. MAHAFFIE, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

It appearing, That on April 7, 1950, the Commission, division 2, entered its report in the above-entitled proceeding, which report is hereby referred to and made a part hereof, and this proceeding now coming on for further consideration on the question of reparation, and the parties having filed agreed statements with respect to the shipments in question, showing among other things, the dates on which payment of the charges assailed was made; we find that complainants shown in the following table are entitled to awards of reparation from the defendants named below, insofar as the transportation over their lines took place in the United States, in the amounts set opposite their respective names, with interest:

<u>Complainants</u>	<u>Defendants</u> <u>Docket No. 29974</u>	<u>Amounts</u>
Acme Peat Products, Ltd.	BCE-CP-S00-CGW	\$ 30.16
ditto	BCE-CP-S00-CGW-SLSF	65.12
ditto	BCE-CP-S00-CMSTP&P	65.12
ditto	BCE-CP-S00-CMSTP&P-AT&SF	30.16
ditto	BCE-CP-S00-CRI&P	66.40
ditto	BCE-CP-S00-C&NW	52.80
ditto	BCE-CP-S00-CMSTPM&O-MP	36.00
ditto	BCE-CP-S00-GN	33.44
ditto	BCE-CP-S00-GN-CB&O	35.76
ditto	BCE-NP-SP	85.50
ditto	BCE-NP-SP-AT&SF	90.88
ditto	CN-GN-CB&Q	134.72
ditto	CN-GN-SP	409.93
ditto	CN-GN-WP-AT&SF	92.24
ditto	CN-DWP-CMSTP&P	34.16
ditto	CN-DWP-CMSTP&P-AT&SF	31.60
ditto	CN-DWP-CMSTP&P-CRI&P	32.72
ditto	CN-DWP-CMSTP&P-MW	38.30
ditto	CN-DWP-CMSTP&P-SLSF	29.28
ditto	CN-DWP-CSTPM&O	39.04
ditto	CN-DWP-CSTPM&O-AT&SF	32.48

No. 29974 - Sheet 2

<u>Plaintiffs</u>	<u>Defendants</u>	<u>Amounts</u>
Peat		
Products, Ltd.	CN-DWP-CStPM&O-C&NW	62.72
ditto	CN-DWP-CStPM&O-CRI&P	100.16
ditto	CN-DWP-CStPM&O-MP	34.48
ditto	CN-DWP-CStPM&O-MP-SLSF	32.72
ditto	CN-DWP-NP-CB&Q	34.32
ditto	CN-DWP-GN-CMStP&P	31.28
ditto	CN-DWP-GN	32.56
ditto	CN-DWP-GN-CRI&P-MP	32.56
ns &		
row, Ltd.	BCE-CP-B&M-NYNH&H	55.44
ditto	BCE*CP-SOO	176.08
ditto	BCE-CP-SOO-Alton-SOU	162.80
ditto	BCE-CP-SOO-BRC (SOO)	28.32
ditto	BCE-CP-SOO-CB&Q	132.25
ditto	BCE-CP-SOO-CB&Q-B&O	28.88
ditto	BCE-CP-SOO-OGW-AT&SF	65.60
ditto	BCE-CP-SOO-CMStP&P	241.28
ditto	BCE-CP-SOO-CMStP&P-C&NW	28.60
ditto	BCE-CP-SOO-CMStP&P-IC	88.24
ditto	BCE-CP-SOO-CMS&M-EJ&E-B&O	161.57
ditto	BCE-CP-SOO-CNS&M-EJ&E-NYC	81.18
Ditto	BCE-CP-SOO-CMS&M-EJ&E-NYC&StL- W&LE-PWV-WM-Reading	46.56
ditto	BCE-CP-SOO-CNS&M-EJ&E-NYC&StL-W&LE	83.00
ditto	BCE-CP-SOO-CNS&M-EJ&E-NYC&StL- W&LE-PWV-WM-Reading	43.20
ditto	BCE-CP-SOO-CNS&M-EJ&E-PENN	458.53
ditto	BCE-CP-SOO-CNS&M-EJ&E-PENN	43.20
ditto	BCE-CP-SOO-CNS&M-EJ&E-PENN-NYNH&H	43.20
ditto	BCE-CP-SOO-CNS&M-EJ&E-NYC-B&O	48.40
ditto	BCE-CP-SOO-CNS&M-EJ&E-ERIE	84.23
ditto	BCE-CP-SOO-CNS&M-EJ&E-GTW	45.10
ditto	BCE-CP-SOO-CNS&M-EJ&E-IC	44.55
ditto	BCE-CP-SOO-CNS&M-EJ&E-NYC	179.62
ditto	BCE-CP-SOO-CNS&M-EJ&E-PENN-N&W	39.60
ditto	BCE-CP-SOO-CNS&M-EJ&E-PM	41.47
ditto	BCE-CP-SOO-CRI&P	168.44
ditto	BCE-CP-SOO-CStPM&O	58.64
ditto	BCE-CP-SOO-CStPM&O	125.51
ditto	BCE-CP-SOO-CStPM&O-C&NW	234.37
ditto	BCE-CP-SOO-CStPM&O-C&NW-IC	30.64
ditto	BCE-CP-SOO-CstPM&O-MP	68.59
ditto	BCE-CP-SOO-CStPM&O-UP	68.00
ditto	BCE-CP-SOO-CstPM&O-C&NW-WAB	30.83
ditto	BCE-CP-SOO-ERIE	89.21
ditto	BCE-CP-SOO-ERIE-DL&W	48.24
ditto	BCE-CP-SOO-ERIE-LV	46.20
ditto	BCE-CP-SOO-GN-CB&Q	162.21
ditto	BCE-CP-SOO-GB&W-KGB&W-PM	39.93
ditto	BCE-CP-SOO-IC-ACL	45.00
ditto	BCE-CP-SOO-IC-SOU	46.56
ditto	BCE-CP-SOO-MN&S-OGW-AT&SF	32.96
ditto	BCE-CP-SOO-MN&S-OGW-AT&SF-GC&SF	136.97
ditto	BCE-CP-SOO-MN&S-OGW-CB&Q	30.24
ditto	BCE-CP-SOO-MN&S-OGW-IC	86.56

Plaintiffs' Exhibit No. 2--(Continued)

No. 29974 - Sheet - 3

ComplainantsDefendantsAmounts

Atkins & Durbrow, Ltd.	BCE-CP-SOO-MN&S-OGW-KCS	
ditto	BCE-CP-SOO-MN&S-OGW-KCS-L&A	35.20
ditto	BCE-CP-SOO-MN&S-CRI&P-KCS T&NO	67.09
ditto	BCE-CP-SOO-MN&S-OGW-KCS- T&NO-T&M	29.52
ditto	BCE-CP-SOO-MN&S-OGW-MKT- MKT of T	29.76
ditto	BCE-CP-SOO-MN&S-OGW-MP	121.68
ditto	BCE-CP-SOO-MN&S-OGW-MP- KCS-L&A	154.48
ditto	BCE-CP-SOO-MN&S-OGW-MP-SLSF	30.00
ditto	BCE-CP-SOO-MN&S-OGW-SLSF- SLSF of T	80.02
ditto	BCE-CP-SOO-MN&S-OGW-SLSF- SLSF of T-T&NO	28.00
ditto	BCE-CP-SOO-MN&S-CRI&P	67.20
ditto	BCE-CP-SOO-MN&S-CRI&P-BRI	60.00
ditto	BCE-CP-SOO-MN&S-CRI&P-KCS T&NO	30.16
ditto	BCE-CP-SOO-MN&S-CRI&P-NYC&StL	124.36
ditto	BCE-CP-SOO-M&StL	40.59
ditto	BCE-CP-SOO-M&StL-IC	149.44
ditto	BCE-CP-SOO-M&StL-WAB-L&N	101.80
ditto	BCE-CP-SOO-M&StL-WAB-SOU	87.89
ditto	BCE-CP-SOO-NYC	186.80
ditto	BCE-CP-SOO-NYC&StL-C&O	133.61
ditto	BCE-CP-SOO-NP	40.26
ditto	BCE-CP-SOO-Penn.	29.44
ditto	BCE-CP-SOO-Penn-N&W	143.38
ditto	BCE-CP-SOO-Penn-Reading	91.56
ditto	BCE-CP-SOO-PM	48.36
ditto	BCE-CP-SOO-WAB	169.29
ditto	BCE-CPR-TH&B-NYC-DL&W- CRR of NJ-Reading	92.96
ditto	BCE-CPR-TH&B-NYC-ERIE	43.20
ditto	BCE-CPR-TH&B-NYC	719.99
ditto	BCE-CPR-TH&B-NYC-Penn	131.46
ditto	BCE-CPR-TH&B-NYC-Penn-LI	132.00
ditto	BCE-CP-Wabash	46.32
ditto	BCE-NP	39.60
ditto	BCE-NP-CB&Q	29.76
ditto	BCE-NP-CB&Q-AT&SF	33.44
ditto	BCE-NP-CB&Q-CRI&P	32.64
ditto	BCE-NP-SP	36.79
ditto	BCE-NP-SP-AT&SF	359.19
ditto	BCE-NP-SP-NWP	63.20
ditto	BCE-NP-SP-PF	25.44
ditto	BCE-NP-SP-UP	68.64
ditto	GN	33.84
ditto	GN-CB&Q	389.52
ditto	GN-CB&Q-AT&SF	553.25
ditto	GN-CB&Q-AT&SF	214.00
ditto	GN-CB&Q-AT&SF-GC&SF	138.76
ditto	GN-CB&Q-B&O	30.24
ditto	GN-CB&Q-B&O-A&Y	89.87
ditto	GN-CB&Q-CI&L	41.58
ditto	GN-CB&Q-C&NW	46.46
ditto	GN-CB&Q-C&O	30.48
ditto	GN-CB&Q-CRI&P-UP	83.49
ditto	GN-CB&Q-C&S-AT&SF	39.60
ditto	GN-CB&Q-C&S-FW&DB-AT&SF	30.72
ditto		29.92

<u>Complainants</u>	<u>Defendants</u>	<u>Amounts</u>
s & Durbrow, Ltd.	GN-CB&Q-C&S-FW&DC-T&NO	29.92
litto	GN-CB&Q-EJ&E-B&O	39.60
litto	GN-CB&Q-IC-SLSF-SAL	56.10
litto	GN-CB&Q-KCS-L&A	124.19
litto	GN-CB&Q-KCS-SP-TM	27.84
litto	GN-CB&Q-MKT	31.20
litto	GN-CB&Q-MKT-STLB&M	30.72
litto	GN-CB&Q-MP	138.20
litto	GN-CB&Q-MP-C&NW	29.20
litto	GN-CB&Q-NYC	94.13
litto	GN-CB&Q-NYC-NYNH&H	44.52
litto	GN-CB&Q-NYC&StL-WLE-P&WV- WM-Reading	48.48
litto	GN-CB&Q-PRR	128.83
litto	GN-CB&Q-PRR-N&W	49.12
litto	GN-CB&Q-PM	39.05
litto	GN-CB&Q-SL&SF	69.75
litto	GN-CB&Q-UP	135.20
litto	GN-OGW-AT&SF	29.76
litto	GN-OGW-B&O	44.11
litto	GN-OGW-NYC	43.12
litto	GN-OGW-ER IE	174.72
litto	GN-OGW-KCS	63.28
litto	GN-OGW-KCS-IC	62.80
litto	GN-OGW-KCS-T&NO	63.55
litto	GN-OGW-KCS-T&NO-TM	28.80
litto	GN-OGW-KCS-Y&MV-IC	29.04
litto	GN-OGW-NYC	33.20
litto	GN-OGW-PRR	194.67
litto	GN-OGW-PRR-SOU	20.52
litto	GN-OGW-SLSF-MKT	31.44
litto	GN-OGW-SLSF-T&NO	61.84
litto	GN-CMStP&P	274.56
litto	GN-CMStP&P-C&O	45.21
litto	GN-CMStP&P-CNS&M-Alton	28.24
litto	GN-CMStP&P-CNS&M-CI&L	39.71
litto	GN-CMStP&P-CNS&M-EJ&E-B&O	42.24
litto	GN-CMStP&P-CNS&M-EJ&E-C&O	39.71
litto	GN-CMStP&P-CNS&M-EJ&E-NYC&StL- W&LE-PWVA-WM-Reading	44.64
litto	GN-CMStP&P-CNS&M-EJ&E-PRR	130.35
litto	GN-CMStP&P-CNS&M-EJ&E-WAB- DL&W-Reading	44.64
litto	GN-CMStP&P-CNS&M-ERIE	101.55
litto	GN-CMStP&P-EJ&E-NYC	39.93
litto	GN-CMStP&P-EJ&E-PRR	82.06
litto	GN-CMStP&P-IHB-NYC	41.14
litto	GN-CMStP&P-NP	60.56
litto	GN-CMStP&P-NYC	153.19
litto	GN-CMStP&P-PRR	43.20
litto	GN-C&NW	625.25
litto	GN-C&NW-B&O	80.63
litto	GN-C&NW-B&O-Reading	44.52
litto	GN-C&NW-C&O	43.20
litto	GN-C&NW-C&O	61.44
litto	GN-C&NW-C&O	48.00
litto	GN-C&NW	36.08
litto	GN-C&NW-CNS&M-EJ&E-C&O	40.04
litto	GN-C&NW-CNS&M-ERIE	40.48

<u>Complainants</u>	<u>Defendants</u>	<u>Amounts</u>
& Durbrow, Ltd.	GN-C&NW-CNS&M-WAB	40.37
itto	GN-C&NW-EJ&E-B&O	45.32
itto	GN-C&NW-CNS&M-EJ&E-NYC&StL- ERIE	44.28
itto	GN-C&NW-CNS&M-NYC	39.05
itto	GN-C&NW-ERIE	93.19
itto	GN-C&NW-NP	92.08
itto	GN-C&NW-MP-AT&SF	28.96
itto	GN-C&NW-NYC&StL	40.48
itto	GN-C&NW-NYC&StL-WLE-PWVa- WM-Reading	47.28
itto	GN-C&NW-NYC	88.00
itto	GN-C&NW-NYC&StL	39.60
itto	GN-C&NW-PRR	292.96
itto	GN-C&NW-PRR-LI	43.08
itto	GN-C&NW-PRR-N&W	44.28
itto	GN-C&NW-PRR-Reading	45.36
itto	GN-C&NW-PM	92.00
itto	GN-C&NW-UP	87.60
itto	GN-CRI&P	101.64
itto	GN-CRI&P-B&O	48.76
itto	GN-CRI&P-C&S&SB-ERIE-NYN&P	43.80
itto	GN-CRI&P-C&S&SB-PRR-BCE	44.88
itto	GN-CRI&P-SLSF	33.52
itto	GN-CRI&P-WAB-DL&W-Reading	45.72
itto	GN-CstPM&O	29.28
itto	GN-CstPM&O-CB&Q	35.20
itto	GN-CstPM&O-MP	27.76
itto	GN-IC	29.76
itto	GN-M&StL	30.48
itto	GN-M&StL-IC	163.66
itto	GN-M&StL-NYC-SOU	54.65
itto	GN-M&StL-IC-NYC&StL-WLE- PWVa-WM-Reading	44.40
itto	GN-M&StL-WAB-SOU	40.15
itto	GN-M&StL-WAB	28.72
itto	GN-MN&S-CGW-AT&SF	60.56
itto	GN-MN&S-CRI&P	120.24
itto	GN-MN&S-CRI&P-MKT	33.68
itto	GN-MN&S-CRI&P-MKT-T&O	30.80
itto	GN-MN&S-CRI&P-MP-SO	40.04
itto	GN-MN&S-CRI&P-SLSF	31.76
itto	GN-MN&S-CRI&P-SLSF-ENO	61.92
itto	GN-SOO	29.36
itto	GN-SOO	29.92
itto	GN-SOO-CNS&M-CI&L	41.47
itto	GN-SOO-CNS&M-EJ&E-WAB	30.64
itto	GN-SP	1174.87
itto	GN-SP	323.33
itto	GN-SP-AT&SF	123.26
itto	GN-SP-NWP	126.88
itto	GN-SP-PE	429.20
itto	GN-UP	71.73
itto	GN-WP	308.78
itto	GN-WP-AT&SF	686.73
itto	GN-WP-D&RGW	30.40
itto	GN-WP-SN	26.76
itto	GN-WP-AT&SF-SD&AE	32.76
itto	GN-WP-TS	26.04

<u>Plaintiffs</u>	<u>Defendants</u>	<u>Amounts</u>
rne Road Peat		
Farms	CN-GN-CB&Q	28.08
ditto	CN-GN-CB&Q-C&S-AT&SF	29.28
ditto	CN-GN-WP-AT&SF	33.35
ditto	CP(V&LI)BCE-NP-CB&Q-AT&SF	32.65
ditto	CP(V&LI)-BCE-NP-SP	295.72
ditto	CP(V&LI)-BCE-NP-SP-AT&SF	300.17
ditto	CP(V&LI)-BCE-NP-SP-PE	30.99
ast Peat Co., Ltd.	CN-GN-CB&Q	33.68
ditto	CN-DWP-CMStP&P-CRI&P	112.16
ditto	CN-DWP-CMStP&P-CRI&P-CB&Q	30.80
ditto	CN-DWP-CMStP&P-CB&Q	58.88
ditto	CN-DWP-SOO	63.36
ditto	CN-DWP-CMStP&P-M&StL	87.84
ditto	CN-DWP-NP	60.24
ditto	CN-DWP-CMStP&P-NYC&StL	43.45
ditto	CN-DWP-CMStP&P-MW	86.90
ditto	CN-DWP-NP-CMStP&P	29.84
ditto	CN-DWP-CMStP&P-SLSF	27.20
ditto	CN-DWP-CMStP&P-CNS&M	34.64
ditto	CN-DWP-CMStP&P	204.72
ditto	CN-DWP-CMStP&P-CGW	148.80
ditto	CN-DWP-CStPM&O	61.28
ditto	CN-DWP-CMStP&P-IC	89.76
ditto	CN-DWP-GN	90.56
ditto	CN-DWP-CStPM&O-C&NW	122.64
ditto	CN-GN-SP	1012.82
ditto	CN-GN-SP	756.75
ditto	CN-GN-SP	547.71
ditto	CN-GN-SP	150.56
ditto	CN-GN-SP-UP	32.08
ditto	CN-GN-SP-NWP	375.53
ditto	CN-GN-SP-NWP	115.36
ditto	CN-GN-WP	332.30
ditto	CN-GN-WP-SN	392.09
ditto	CN-GN-WP-SN	84.62
ditto	CN-GN-WP-AT&SF	251.70
ditto	CN-GN-WP	23.10
ditto	CN-GN-WP-D&RGW	72.49
ditto	CN-GN-UP-D&RGW	40.37
ditto	CN-GN-UP	204.24
ditto	CN-GN-UP	17.10
ditto	CP-NP-SP	681.58
ditto	CP-NP-SP	654.57
ditto	CP-NP-SP	611.72
ditto	CP-NP-SP	621.61
ditto	CP-NP-SP	502.63
ditto	CP-NP-SP	231.81
ditto	CP-NP-SP-NWP	163.57
ditto	CP-NP-SP-AT&SF	60.82
ditto	CP-NP-SP	31.43
ditto	CP-NP-SP-SN	162.57
ditto	CP-NP-SP-WP	85.25
ditto	CP-NP	205.16
ditto	CP-NP-SP-SN	24.23
ditto	CP-NP-SP-WP	23.98
ditto	GN-SP	22.19
ditto	GN-WP-AT&SF	23.79

<u>Plaintiffs</u>	<u>Defendants</u>	<u>Amounts</u>
or Peat Co., Ltd.	CN-DWP-CMStP&P	84.88
itto	CN-DWP-CMStP&P-M&StL-WAB	29.76
itto	CN-DWP-CMStP&P-MKT	28.32
itto	CN-DWP-CMStP&P-MP	114.80
itto	CN-DWP-CStPM&O-CB&Q	207.08
itto	CN-DWP-CStPM&O-CGW	58.88
itto	CN-DWP-CStPM&O-CNW-CRI&P	120.00
itto	CN-DWP-CStPM&O-CRI&P-UP	57.84
itto	CN-DWP-CStPM&O-M&StL	60.80
itto	CN-DWP-CStPM&O-M&StL-WAB	27.20
itto	CN-DWP-CStPM&O-MP	28.08
itto	CN-GN-CB&Q	29.76
itto	CN-GN-SP	55.80
itto	CN-GN-SP-NWP	27.72
itto	CN-GN-UP-CPR	11.75
itto	CN-GN-WP	43.25
itto	CN-GN-WP-AT&SF	61.29
itto	CP (V&LI) -BCE-NP-SP-PE	31.41
land Peat Co., Ltd.	CN-DWP-CMStP&P	122.92
itto	CN-DWP-CMStP&P-MP	28.08
itto	CN-DWP-CMStP&P-UP	27.20
itto	CN-DWP-CStPM&O-C&NW	58.00
itto	CN-DWP-CStPM&O-C&NW-CRI&P	29.92
itto	CN-DWP-GN	31.95
itto	CN-DWP-NP-CGW-AT&SF	29.04
itto	CN-GN-CB&Q-UP	29.92
itto	CN-GN-UP	29.92
itto	CN-GN-WP	20.76
itto	CN-GN-WP-AT&SF	24.88
itto	CP (V&LI) -BCE-NP-SP	48.78
n Peat Moss Co.,		
d.	CN-GN	23.16
itto	CN-GN-CB&Q-AT&SF	29.44
itto	CN-GN-CB&Q-UP	30.48
itto	CN-GN-NP	4.02
itto	CN-GN-NP-CAMP	12.42
itto	CN-GN-SP	299.49
itto	CN-GN-UP	30.56
itto	CN-DWP-CMStP&P	35.37
itto	CN-DWP-CMStP&P-MP-L&N-ACL	43.32
itto	CN-DWP-CMStP&P-C&NW	27.36
itto	CN-DWP-CStPM&O-C&NW-CB&Q	27.20
itto	CN-DWP-NP-M&StL-IC	27.20
itto	CN-DWL-GN	29.60
itto	CP (V&LI)-BCE-NP-SP	27.00

<u>Complainants</u>	<u>Defendants</u>	<u>Amounts</u>
Pacific Peat Products		
Ltd.	CN-GN-CB&Q	118.00
ditto	CN-GN-NP	3.73
ditto	CN-GN-SP	274.76
ditto	CN-GN-NP-SP	15.44
ditto	CN-GN-UP	68.40
ditto	CN-GN-WP	21.00
ditto	CN-GN-WP-AT&SF	439.97
ditto	CN-GN-WP-SN	70.56
ditto	CN-DWP-CMStP&P	60.07
ditto	CN-DWP-CMStP&P-AT&SF	93.12
ditto	CN-DWP-CMStP&P-MKT	28.56
ditto	CN-DWP-CMStP&P-MP	120.08
ditto	CN-DWP-CMStP&P-SLSF	28.08
ditto	CN-DWP-CstPM&O	30.97
ditto	CN-DWP-CstPM&O-CB&Q	27.92
ditto	CN-DWP-CstPM&O-C&NW	30.53
ditto	CN-DWP-CstPM&O-CRI&P	220.24
ditto	CN-DWP-CstPM&O-M&StL	31.51
ditto	CN-DWP-GN-CB&Q	65.04
ditto	CN-DWP-GN-CB&Q-AT&SF	60.96
ditto	CN-DWP-GN-CB&Q-SLSF	63.76
ditto	CN-DWP-GN-CGW-MP	31.12
ditto	CN-DWP-GN-CRI&P	91.36
ditto	CN-DWP-GN-CB&Q	30.40
ditto	CN-DWP-NP-CGW	93.76
ditto	CN-DWP-NP-CMStP&P	89.84
ditto	CN-DWP-NP-CMStP&P-CGW	30.72
ditto	CN-DWP-NP-CRI&P	32.00
ditto	CN-DWP-NP-M&StL	60.72
Richmond Peat Products		
Ltd.	CN-DWP-CMStP&P	46.24
ditto	CN-DWP-CMStP&P-MP	37.68
ditto	CN-DWP-CstPM&O-C&NW	41.52
ditto	CN-DWP-CstPM&O-CRI&P	80.08
ditto	CN-GN-NP	7.30
ditto	CN-GN-SP&S-OT	16.41
ditto	CN-GN-SP	121.36
ditto	CN-GN-WP-AT&SF	34.00
Hafer-Haggart, Ltd.	CN-DWP-CMStP&P	170.24
ditto	CN-DWP-CMStP&P-AT&SF	28.48
ditto	CN-DWP-CMStP&P-AT&SF-T&NO	27.52
ditto	CN-DWP-CstPM&O-CB&Q	59.12
ditto	CN-DWP-CstPM&O-C&NW-MP	29.44
ditto	CN-DWP-CstPM&O-CRI&P	87.44
ditto	CN-DWP-CstPM&O-MP	27.52
ditto	CN-DWP-CstPM&O-UP	27.92
ditto	CN-GN-WP-AT&SF	31.92

<u>Complainants</u>	<u>Defendants</u>	<u>Amounts</u>
Western Peat Co., Ltd.	CN-DWP-CMStP&P	30.00
ditto	CN-DWP-CMStP&P-AT&SF	29.76
ditto	CN-DWP-CMStP&P-CRI&P-SP-T&P	36.40
ditto	CN-DWP-CMStP&P-M&StL	57.56
ditto	CN-DWP-CMStP&P-PM	40.46
ditto	CN-DWP-CMStP&P-SLSF	58.00
ditto	CN-DWP-C&NW-CB&Q	28.48
ditto	CN-DWP-C&NW-M&StL	28.40
ditto	CN-DWP-CStPM&O	28.88
ditto	CN-DWP-CStPM&O-CGW-T&NO	30.16
ditto	CN-DWP-CStPM&O-C&NW	268.55
ditto	CN-DWP-CStPM&O-C&NW-CRI&P	28.40
ditto	CN-DWP-CStPM&O-CRI&P-AT&SF	28.88
ditto	CN-DWP-CStPM&O-MP	28.48
ditto	CN-DWP-GN	30.08
ditto	CN-DWP-GN-CB&Q	57.92
ditto	CN-DWP-GN-CB&Q-MKT	28.56
ditto	CN-DWP-GN-CGW	30.40
ditto	CN-DWP-GN-MN&S-CRI&P	113.12
ditto	CN-DWP-GN-MN&S-CRI&P-MP	27.68
ditto	CN-DWP-GN-M&StL	28.24
ditto	CN-DWP-GN-SOO	29.68
ditto	CN-DWP-MN&S-CRI&P	30.64
ditto	CN-DWP-NP	27.52
ditto	CN-DWP-NF-CRI&P-SL&SW-F&DC	31.15
ditto	CN-DWP-SOO	30.08
ditto	CN-DWP-SOO-CB&Q	27.20
ditto	CN-GN	39.79
ditto	CN-GN-CB&Q	30.17
ditto	CN-GN-NP	27.29
ditto	CN-GN-SP	520.24
ditto	CN-GN-SP	1060.26
ditto	CN-GN-SP	629.86
ditto	CN-GN-SP-AT&SF	414.77
ditto	CN-GN-SP-N/P	452.22
ditto	CN-GN-SP-NWP-P&SR	52.58
ditto	CN-GN-SP-PF	95.16
ditto	CN-GN-SP-UP	93.25
ditto	CN-GN-UP	216.64
ditto	CN-GN-UP-MP	32.88
ditto	CN-GN-WP	70.89
ditto	CN-GN-WP-AT&SF	179.62
ditto	GN	203.05
ditto	GN-CB&Q	97.83
ditto	GN-CB&Q-CRI&P	34.56
ditto	GN-CMStL&P	130.16
ditto	GN-C&NW-CRI&P	29.28
ditto	GN-C&NW-MP	29.76
ditto	GN-CRI&P	35.92
ditto	GN-CRI&P-AT&SF	33.84
ditto	GN-M&StL	32.56
ditto	GN-NP	4.13
ditto	GN-SP	803.29

<u>Complainants</u>	<u>Defendants</u>	<u>Amounts</u>
Western Peat Co., Ltd.	GN-SP-AT&SF	222.84
ditto	GN-SP-NWP	329.08
ditto	GN-SP-IE	196.26
ditto	GN-SP-UP	64.97
ditto	GN-UP	108.67
ditto	GN-WP	84.64

<u>Complainants</u>	<u>Defendants</u>	<u>Amounts</u>
Louette Peat Products, Ltd.	CP-S00-CB&Q	64.91
ditto	CP-S00-CGW-UP	34.80
ditto	CP-S00-CI&L	49.48
ditto	CP-S00-CMStP&P	178.71
ditto	CP-S00-CMStP&P-GB&W	27.67
ditto	CP-S00-C&NW	88.67
ditto	CP-S00-CStPM&O-CB&Q	121.08
ditto	CP-S00-CstPM&O-C&NW	91.11
ditto	CP-S00-CStPM&O-GN	30.61
ditto	CP-S00-CStPM&O-MP	63.09
ditto	CP-S00-ERIE	37.60
ditto	CP-S00-GN-CB&Q	31.12
ditto	CP-S00-IC-NC&StL	85.36
ditto	CP-S00-MN&S-CGW	30.31
ditto	CP-S00-MN&S-CGW-MKT	31.69
ditto	CP-S00-MN&S-CRI&P	121.10
ditto	CP-S00-MN&S-CRI&P-CI&L	46.49
ditto	CP-S00-MN&S-CRI&P-KCS-SSW-SP	37.53
ditto	CP-S00-MN&S-CRI&P-SLSF	27.20
ditto	CP-S00-M&StL	30.88
ditto	CP-S00-MidC-CMStP&P-M&StL	29.01
ditto	CP-S00-NYC	45.71
ditto	CP-S00-PRR	47.76
ditto	CN-NP	26.43
ditto	CP-NP-CB&Q	34.27
ditto	CP-NP-SP	850.30
ditto	CP-NP-SP-AT&SF	31.51
ditto	CP-NP-SP-N/P	57.54
ditto	CP-NP-SP-SN	106.22
ditto	CP-NP-SP-PE	60.37
ditto	CP-NP-SP-WP	57.03
ditto	CP-NP-UP	63.84
ditto	CP-TH&B-MC(NYC)-PRR-SOU	43.32

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Louette Peat Products, Ltd.	CP-S00-CB&Q	85.42
ditto	CP-S00-CGW-AT&SF	35.96
ditto	CP-S00-CStPM&O	35.29
ditto	CP-S00-CStPM&O-CB&Q	70.17
ditto	CP-S00-CStPM&O-C&NW	250.59
ditto	CP-S00-CStPM&O-MP	44.56
ditto	CP-S00-CStPM&O-MP-UP	70.88
ditto	CP-S00-CStPM&O-UP	76.84
ditto	CP-S00-GN-CB&Q	72.51
ditto	CP-S00-MN&S-CGW	34.11
ditto	CP-S00-MN&S-CGW-C&NW	34.75
ditto	CP-S00-MN&S-CGW-UP	71.90
ditto	CP-S00-MN&S-CRI&P	35.76
ditto	CP-S00-MN&S-CRI&P-MP	35.34

<u>Complainants</u>	<u>Defendants</u>	<u>Amounts</u>
Louette Peat		
Products, Ltd.	CP-NP	27.43
ditto	CP-NP-CB&Q-ST&SF	35.67
ditto	CP-NP-SP	1862.54
ditto	CP-NP-SP-AT&SF	121.25
ditto	CP-NP-SP-AT&SF-M&ET	35.49
ditto	CP-NP-SP-NWP	29.96
ditto	CP-NP-SP-NWP-P&SR	25.88
ditto	CN-NP-SP-PE	118.41

It is therefore ordered, That the defendants, named in each of the groups shown in the above table, be, and they be hereby, authorized and directed to pay unto the complainants shown opposite said groups, on or before February 19, 1954, the amounts set opposite their respective names in said table, with interest thereon at the rate of 4 percent per annum, from the respective dates of payment of the charges assailed shown in the aforesaid agreed statements, as reparation on account of unreasonable rates charged and collected on numerous carload shipments of ground peat, shipped from points in British Columbia, Canada, and points in the United States, insofar as the transportation took place in the United States.

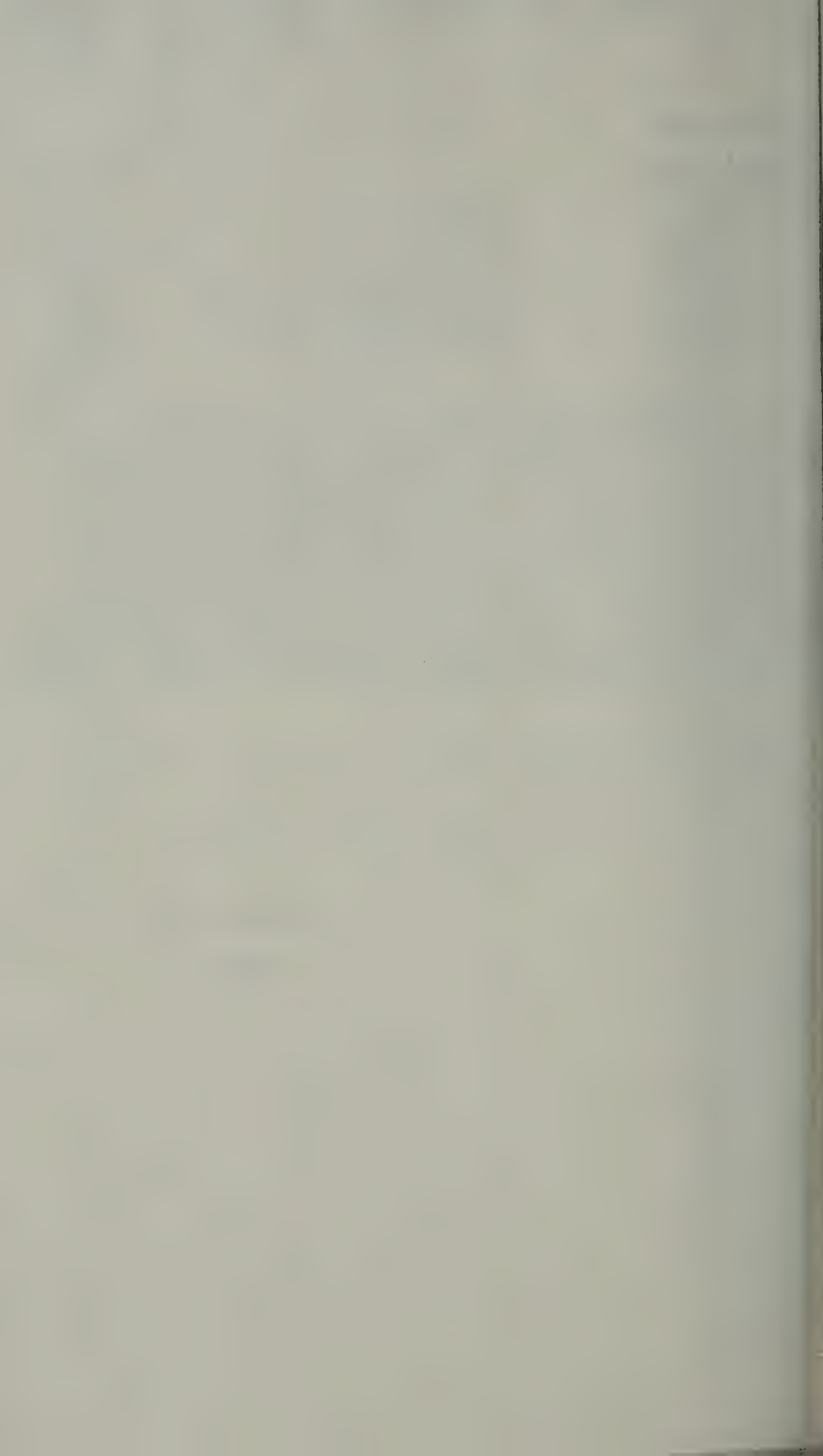
Dated at Washington, D. C., this 30th day of December, 1953.

By the Commission, Commissioner Mahaffie.

GEORGE W. LAIRD,

Secretary.

EAL)



Plaintiffs' Exhibit No. 2—(Continued)

Filed 6/21/54

Before the Interstate Commerce Commission

No. 29974—Acme Peat Products, Ltd., et al., Complainants, vs. The Akron, Canton and Youngstown Railway Company, et al., Defendants.

PETITION FOR LEAVE TO FILE PETITION
TO REOPEN AND RECONSIDER

Come Now the defendants, and petition the Commission for leave to file a petition to reopen this proceeding for reconsideration of the decision of Division 2 in this cause, dated April 7, 1950, and to vacate the order of December 30, 1953 requiring the payment of reparations.

For the reasons stated in our petition for reconsideration of the report and order of Division 2 filed in this cause, dated June 23, 1950, these defendants were and are of the opinion that in awarding reparations, the Commission exceeded its authority.

After our petition for reconsideration was denied by the Commission, while we concluded not to review the order, we did conclude not to voluntarily comply with the order requiring the payment of reparations, and to test the validity of the order and when suit was instituted to enforce the award of reparations. Consequently, no reparations have been paid, and suit has not yet been instituted to enforce the reparation order entered in this cause, dated December 30, 1953.

Plaintiffs' Exhibit No. 2—(Continued)

After taking this position, we noted that the identical principle adopted by the Division in this proceeding was involved in the case of *F. W. Bolgiano & Co. vs. Baltimore & Ohio Ry. Co., et al.*, 289 I.C.C. 169, in which Division 2 awarded reparations, citing and relying on the decision of the Division in this case.

We now have a copy of the decision of Division 2 on reconsideration in the *Bolgiano* case, dated February 11, 1954, reversing the earlier findings and rejecting the principle previously adopted therein and in this case, and dismissing the complaint.

This change in circumstances has prompted our filing this petition for leave to file petition to reopen for reconsideration the decision in this case.

Wherefore, your petitioners pray for leave to file a petition to reopen this case for reconsideration.

Respectfully submitted,

Charles W. Burkett

Harold G. Boggs

L. W. Hobbs

B. E. Lutterman

R. Paul Tjossem

Attorneys for Defendants

Dated at Seattle, Washington, this 2nd day of March, 1954.

Certificate of Service attached.

Plaintiffs' Exhibit No. 2—(Continued)

Filed 6/21/54

Before the Interstate Commerce Commission

No. 29974—Acme Peat Products, Ltd., et al., Complainants, vs. The Akron, Canton and Youngstown Railway Company, et al., Defendants.

PETITION TO REOPEN FOR RECONSIDERATION

Come Now the defendants, and petition the Commission to reopen this cause, and to reconsider and reverse the decision entered herein by Division 2, dated April 7, 1950, and to vacate the order of December 30, 1953 requiring the payment of reparations by these defendants.

Statement of the Case

In deciding this case, Division 2, so far as we can determine, for the first time applied the doctrine of "unjust enrichment" as a basis for awarding reparation, and granted reparations even though it was not shown that the complainants had suffered any damage. Commissioner Elliott in his dissent in the subsequent case of F. W. Bolgiano & Co. vs. Baltimore & Ohio Ry. Co., et al., 289 I.C.C. 169, states he was unable to find any other similar decision; nor have we by our research found any similar decision.

The above mentioned Bolgiano case involved the same issue presented in this proceeding, and the Division in its first decision, dated June 25, 1953,

Plaintiffs' Exhibit No. 2—(Continued)

followed and affirmed the decision herein. The Division on reconsideration in the *Bolgiano* case has now reversed its first decision and rejected the doctrine first announced in this proceeding. This action leaves only this case in which this erroneous doctrine has been applied.

As stated in our petition for leave to file this petition, the defendants have not paid any reparations as required by the order dated December 30, 1953. Consequently the decision in this case has not become moot.

The decision in this case is erroneous, and this proceeding should be reopened and the decision should be reconsidered and reversed.

Argument

The error committed by the Division has been pointed out by us in our petition for reconsideration, by Commissioner Elliott in his dissent to the first decision in the *Bolgiano* case, by the defendants in the *Bolgiano* case in their petition to reopen and reconsider that decision, and now by the majority of Division 2 in their decision on reconsideration in the latter case. The error is apparent and little can be added to the arguments and reasoning already presented.

However, we might add this:

From the first, the power of the Commission to award reparations has been limited to making such awards in satisfaction of damages sustained by complainants. Following the grant of this power, it

Plaintiffs' Exhibit No. 2—(Continued)

has never been enlarged upon, and the limits of that power as defined by the Supreme Court in *Davis vs. Portland Seed Co.*, 264 U.S. 403, 68 L.ed. 762, hold true today.

In that case, the court considered rates filed in contravention of the 4th section of the Act, and held that the mere showing of this fact did not authorize reparations to the basis of the lower rate. The court pointed out (page 765):

“Relying on *Pennsylvania R. Co. vs. International Coal Min. Co.*, 230 U.S. 184, 57 L.ed. 1446, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315, the Interstate Commerce Commission has definitely rejected respondent's theory by many opinions, and holds that while a charge prohibited by the long and short haul clause (§4) may subject the carrier to prosecution by the government, it does not afford adequate basis for reparation where there is no other proof of pecuniary damage. *John Nix & Co. vs. Southern R. Co.* (1914) 31 Inters. Com. Rep. 145; *S. J. Greenbaum Co. vs. Southern R. Co.*, 38 Inters. Com. Rep. 715; *Chattanooga Implement & Mfg. Co. vs. Louisville & N. R. Co.*, 40 Inters. Com. Rep. 146; *LaCrosse Shippers' Asso. vs. Chicago, I. & L. R. Co.*, 43 Inters. Com. Rep. 520; *Oregon Fruit Co. vs. Southern P. Co.*, 50 Inters. Com. Rep. 719; *Iten Biscuit Co. vs. Chicago, B. & Q. R. Co.*, 53 Inters. Com. Rep. 729; *Illinois Brick Co. vs. Director Gen.* (1920) 57 Inters. Com. Rep. 320, 323.”

The court cited with approval the following

Plaintiffs' Exhibit No. 2—(Continued)

language found in *Parsons vs. Chicago & N. W. R. Co.*, 167 U.S. 447, 42 L.ed. 231,

“ ‘Before any party can recover under the act, he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.’ Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what, though called damages, would really be a penalty, in addition to the penalty payable to the government.”

The foregoing statement is the law today and applies to rates claimed to have been filed in violation of Section 6, as well as to rates filed in violation of Section 4.

Since a majority of Division 2 have now recognized the error in the decision in this case, it may be unnecessary to consider the dissent of Commissioner Alldredge to the second decision in the *Bolgiano* case. However, since this petition may be reviewed by the entire Commission, we do wish to comment on one issue raised in this dissent: Commissioner Alldredge in his dissent cites *Southern Pac. Co. et al. vs. Darnell-Taenzer Co. et al.*, 245 U.S. 520, 534, 62 L.ed. 455, and *I.C.C. vs. U. S.*, 289 U.S. 385, 390, 77 L.ed. 1273, as supporting the rule that if the increases in the rates charged were not authorized, shippers are entitled to reparations to the extent of the unauthorized increases. These cases do not support this contention. It is evident from these cases that the “illegal profit” referred to in the quotation cited by Commissioner All-

Plaintiffs' Exhibit No. 2—(Continued)

dredge is a profit in excess of a reasonable charge.

In *Southern Pac. Co. vs. Darnell-Taenzer Co. et al.*, *supra*, the court denied the contention that a shipper who has paid an excessive rate could recover only if he was unable to pass this charge on to another party. The holding in this case is made completely clear by Judge Cardozo in the second cited case, *I.C.C. vs. U. S.*, *supra*, at page 390:

"When the rate exacted of a shipper is excessive or unreasonable in and of itself, irrespective of the rate exacted of competitors, there may be recovery of the overcharge without other evidence of loss. The carrier ought not to be allowed to retain his illegal profit and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum.' *Southern P. Co. vs. Darnell-Taenzer Lumber Co.*, *supra*."

The court in the last cited case affirms the rule that reparations can be allowed by this Commission only when the complainants are shown to have been damaged by some act of the defendants.

Division 2 in awarding reparations did not find that the assailed rates were excessive. Nor could they. The sole basis (and the only basis on this record, for that matter) for condemning these rates was the finding that the carriers applied unauthorized increases. The evidence bearing on the reasonableness or unreasonableness of the assailed rates is accurately summarized by Examiners Hall and Fishman in their proposed report when they stated,

Plaintiffs' Exhibit No. 2—(Continued)

"Other than showing that the rates assailed were increased by greater amounts than the rates on fertilizers, complainants offered no substantial evidence in support of their allegation of unreasonableness. * * * There is nothing of record in the instant case to indicate that the basic rates on peat, established to meet competitive conditions, were maximum reasonable rates. On the contrary, the evidence discloses that to California destinations, for example, that if the original rates established in 1937 and increased in 1938 had been subject to no voluntary reductions and had been increased by all general increases authorized by the Commission, they would have been substantially higher than the rates assailed."

The assailed rates are shown to be depressed rates made to meet marketing competition, and fall well below reasonable maximum levels. The only evidence offered by complainants bearing on the issue of the reasonableness of the charges was their Exhibit 1, Subparagraphs 8 and 9, page 2. Here it is shown that the basic rates (the rates in effect prior to any increase) will return only 12 and a fraction cents per car mile, and this is compared with the then permitted 4th section minimum earnings of 10 cents per car mile. Consequently, if the basic rates are increased 20 per cent (the basis of the assailed rates), the car mile earnings become 14.4 cents. The Examiners were correct in their statement that the complainants offered no substantial evidence that the rates were unreasonable.

Plaintiffs' Exhibit No. 2—(Continued)

Conclusion

The complainants have not been damaged. The decision of Division 2 should be reversed, the order awarding reparations vacated, and the complaint dismissed.

Respectfully submitted,

Charles W. Burkett

Harold G. Boggs

L. W. Hobbs

B. E. Lutterman

R. Paul Tjossem

Attorneys for Defendants

Dated at Seattle, Wash., this 2nd day of March, 1954.

Certificate of Service attached.

* * * *

Filed 7/6/54

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 21st day of June, A.D. 1954.

No. 29974—Acme Peat Products, Ltd., et al., vs. Akron, Canton & Youngstown Railway Company, et al.

No. 30260—Alouette Peat Products, Ltd., vs. Atchison, Topeka & Santa Fe Railway Company.

Upon consideration of the record in the above-

Plaintiffs' Exhibit No. 2—(Continued)

applicable, and not shown to have been unjust, unreasonable, or otherwise unlawful. Findings in prior report, 277 I.C.C. 641, reversed in part, and complaint dismissed.

Appearances as shown in prior report.

REPORT OF THE COMMISSION ON RECONSIDERATION

By the Commission:

In the prior report herein, 277 I.C.C. 641, division 2 found that the assailed rates² on ground peat, shipped in carloads from points in British Columbia, Canada, to points in the United States were applicable, but unjust and unreasonable to the extent that the resulting charges for transportation within the United States were higher than the levels in effect prior to our decision in *Ex Parte* No. 162, *Increased Railway Rates, Fares, and Charges*, 1946, 266 I.C.C. 537, 623, plus an increase, authorized in that proceeding, of 20 percent, subject to a maximum of 6 cents per 100 pounds, or \$1.20 per net ton. Upon petition by the defendants, the proceeding was reopened for reconsideration on the record as made. The pertinent facts are herein restated only insofar as appears necessary.

Rates in tariffs which included ground peat in the description of fertilizers and which were increased 20 percent, subject to a maximum of 6 cents per 100 pounds, or \$1.20 per ton, as specific-

² Rates are herein stated per 100 pounds.

Plaintiffs' Exhibit No. 2—(Continued)

ally authorized for a group of fertilizers which included peat, are not assailed. The assailed rates are those which were published as commodity rates on ground peat, and were increased 20 percent but not subject to a maximum per 100 pounds, for which the authority stated was the decision in Ex Parte No. 162. As stated by the division in the prior report the complainant's contention that the assailed rates were not applicable has no merit since a rate published in a tariff on file with the Commission does not become inapplicable by reason of the fact that it contravenes an order of the Commission or was published on short notice without authority. An award of reparation in such circumstances has no justification except upon a showing that damages, as measured by sound standards, were sustained.

The only issue presented for determination is whether the published transportation charges paid by the complainants exceeded maximum reasonable charges. This is the only standard of justness by which compensatory damages can properly be measured for an award of reparation upon the facts presented. For the reasons stated in the prior report, there is no showing of undue prejudice. In a similar proceeding concerning increases in rates on humus, *F. W. Bolgiana & Co., Inc., vs. Baltimore & O. R. Co.*, 289 I.C.C. 169, 291 I.C.C. 659, by division 2, in which we denied a petition of complainants for reconsideration, it is stated in the second report, at pages 660 and 661:

Plaintiffs' Exhibit No. 2—(Continued)

The evidence introduced by the complainants, and their contentions founded thereon, as to the unreasonableness of the rates on humus in bulk, consists solely of the fact that the 25-percent increase in the column 17.5 rates was published, under color of authorization in Ex Parte No. 162, in tariffs which became effective on short notice. The authorization in Ex Parte No. 162 having been limited to an increase of 20 percent, subject to a maximum of 6 cents per 100 pounds, it is obvious that the defendants acted without authority from this Commission. However, since we have no authority to award punitive or exemplary damages, the publication of the 25-percent increase in violation of the Commission's tariff rules as to notice does not afford a sufficient basis for a finding of unreasonableness or an award of reparation. In other words, the defendants are subject to censure for improper tariff publication, but that fact alone is inadequate support for an award of damages against them.

Here, as in the proceeding just cited, the defendants are subject to censure for improper tariff publication but that situation alone does not afford an adequate basis for a finding of unreasonableness or an award of reparation, since we have no authority to award punitive or exemplary damages. We shall now consider the evidence of record relating to the reasonableness of the assailed charges.

Peat, also called peat moss, is available in Canada in the provinces of British Columbia, Ontario,

Plaintiffs' Exhibit No. 2—(Continued)

Nova Scotia, and New Brunswick, in the United States in Maine, and has been imported from Germany and Sweden. The shipments here under consideration came from British Columbia. Peat is there obtained from peat bogs in delta land near the Fraser River, is dried in the sun, or by the use of hydraulic machinery, is ground either coarse or fine, then packed in bales averaging around 115 pounds and having a density of about 11.5 pounds per cubic foot. Six commercial fertilizers named by defendants range from 57.4 to 86 pounds per cubic foot. The selling price of peat, f.o.b. origin or destination, depending in part on competitive conditions, is around \$1.75 to \$1.85 per bale. It is shipped in closed freight cars.

The coarse variety is used as poultry litter, and the finely ground for horticultural purposes. About three-fourths of the ground peat shipped by complainants to destinations in the United States is the horticultural variety. When mixed with the soil, ground peat adds little or nothing to its fertility. The initial effect of such mixing is to condition the soil by making it pliable and mellow. In addition peat holds water like a sponge, helps the soil to retain moisture, and is sold to residents of cities and towns for use in the establishment of lawns as well as to individuals engaged in agriculture. The coarse variety, sold as poultry litter, competes in California with ground bark, straw, wood shavings, and sawdust, and in the middle west with some of all of these items and in addition it there com-

Plaintiffs' Exhibit No. 2—(Continued)

petes with processed sugar cane, oat hulls, and porous lava rock.

During the period when the shipments under consideration were made, more than 1,500 carloads of ground peat, destined to points in the United States, were shipped over various routes from origins in British Columbia, including a substantial number from New Westminster, B. C., situated near the west coast, 141 miles northward via rail from Seattle, Wash., and about 20 miles north of the Canadian boundary. They were consigned to numerous points in 40 designated States, of which 21 are west of the Mississippi River. Shipments to California approximated 768 carloads, Iowa 105, Illinois 67, Kansas 62, Nebraska 60, Texas 57, Missouri 53, Minnesota 41, and from 1 to 35 carloads to points in 32 other States.

In 1929 one of the complainants herein requested certain rail carriers to provide carload rates for the transportation of peat from origins in British Columbia to indicated western points in the United States, and the carriers subsequently published, at designated periods during the years, 1930 to 1937, rates from New Westminster ranging from 14 to 20 cents to Seattle, Wash., 14 to 17 cents to Tacoma, Wash., and from 24 to 33 cents to Portland, Oreg., minimum weights 24,000 to 40,000 pounds. Effective March 6, 1937, all-rail joint commodity rates on peat of 80 cents to points in California on San Francisco Bay and 100 cents to points in southern California, including Los Angeles, mini-

Plaintiffs' Exhibit No. 2—(Continued)

imum 24,000 pounds, were established in an effort to meet the competition of imports which in 1936 had aggregated 4,455 tons. From Sweden and Germany, respectively, peat was delivered on the docks at San Francisco at transportation costs, including toll and handling charges, of 43.6 and 38.1 cents per 100 pounds.

The joint rates from New Westminster to San Francisco and Los Angeles, minimum weight 24,000 pounds, were increased from 80 to 100 cents, respectively, to 88 and 110 cents, on March 28, 1938, as authorized in Ex Parte 123, Fifteen Percent Case, 1937-1938, 226 I.C.C. 41. Thereafter on June 30, 1939, the defendants established a reduced rail rate of 58 cents from New Westminster to designated points in central California, including San Francisco, and 73 cents to Los Angeles, minimum weight 30,000 pounds, to enable the California distributors not having foreign connections, to participate in the marketing of this product, and on August 6, 1940, a rate of 72 cents, minimum weight 36,000 pounds became effective from New Westminster to Los Angeles, an intermediate point on a transcontinental route to easterly points to which a rate of 72 cents was established because of competition with foreign products imported through ports in the East.

The rail rate of 58 cents from New Westminster to points grouped with San Francisco, and the rate of 72 cents to Los Angeles, were in effect on December 31, 1946, immediately prior to increases

Plaintiffs' Exhibit No. 2—(Continued)

established pursuant to the decision in *Increased Railway Rates, Fares, and Charges, 1946, supra*. By the addition of 20 percent, effective January 1, 1947, the rate from New Westminster to points grouped with San Francisco became 70 cents, and the rate to Los Angeles 86 cents. These rates, which complainants assail as unlawfully high, may be compared with the rates of 88 cents from New Westminster to the San Francisco group, and 110 cents to Los Angeles, which became effective in March 1938 when increased rates were established pursuant to authority granted in *Fifteen Percent Case, 1937-1938, supra*.

The complainants estimate the average weight of their shipments as 38,182 pounds per carload. The yield from the assailed rate of 70 cents from New Westminster to San Francisco, 1,034 miles, on an average carload is 25.8 cents a car-mile; the yield from the rate of 86 cents from New Westminster to Los Angeles, 1,404 miles, is 23.2 cents a car-mile. Other points specifically mentioned by complainants as destinations to which ground peat was shipped from New Westminster at the assailed rate of 86 cents include Des Moines, Iowa, 2,073 miles, Chicago, Ill., 2,239 miles, and St. Louis, Mo., 2,478 miles, to which the yields from this rate for an average carload of 38,182 pounds are 15.8, 14.6, and 13.3 cents a car-mile.

There is no evidence that can be said to afford a sound basis for a finding of unreasonableness.

Upon reconsideration, we find that the assailed

Plaintiffs' Exhibit No. 2—(Continued)

ates were applicable and are not shown to have been unjust, unreasonable, or otherwise unlawful. The findings in the prior report to the extent that they conflict with those made herein are reversed. The complaint will be dismissed.

Aldredge, Commissioner, dissenting:

I am unable to agree with the conclusions reached by the majority. In my opinion, the reasoning of Division 2 in the prior report was entirely sound, and the ultimate findings therein should be affirmed.

Admittedly, defendants violated the Commission's permissive order in Ex Parte No. 162 by increasing the basic rates on ground peat from and to the points here concerned by amounts in excess of those authorized. As these increases were named in tariffs that became effective on extremely short notice, complainants were prevented from exercising the statutory right that otherwise would have been available to point out the carriers' error and enter protest before the increased rates took effect. The majority concludes that while, as a result of such unauthorized action, "defendants are subject to censure for improper tariff publication," nevertheless "that situation alone does not afford an adequate basis for a finding of unreasonableness or an award of reparation, since we have no authority to award punitive or exemplary damages."

We are not here dealing with a question of mere reasonableness from a mathematical standpoint. The statute (section 1) demands that rates be just

Plaintiffs' Exhibit No. 2—(Continued)

as well as reasonable. In my judgment, the record does afford a sufficient basis for a finding that defendants violated section 1 of the act despite the absence of authority on our part to award punitive or exemplary damages. It is obvious that complainants were actually damaged by defendants' violation of a valid order issued by the Commission, and it is equally manifest that defendants received and have retained charges in excess of those to which they were justly entitled.

Censure, the only possible remedy suggested by the majority, would represent the judgment of the Government acting in its sovereign capacity in behalf of the public generally. It would be neither appropriate nor effective as a means of redressing private wrongs. Only an award of reparation could accomplish the latter purpose in this instance. The decision of division 2 making such an award should not, therefore, be overturned.

I am authorized to state that Commissioner Mahaffie joins in this expression.

Commissioners Johnson and Arpaia did not participate in the disposition of this proceeding.

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 4th day of October, A.D. 1954.

No. 29974—Acme Peat Products, Ltd., et al., vs.

Plaintiffs' Exhibit No. 2—(Continued)

Akron, Canton & Youngstown Railroad Company, et al.

No. 30260—Alouette Peat Products, Ltd., vs. Atchison, Topeka and Santa Fe Railway Company.

It appearing, That on April 7, 1950, division 2 of the Commission made and filed a report in this proceeding, and that upon petition by the defendants the proceeding was reopened for reconsideration;

It is ordered, That the complaints in these proceedings, on the date hereof, made and filed a report on reconsideration, which report and the aforesaid report of April 7, 1950, are hereby referred to and made a part hereof.

It is ordered, That the complainant in these proceedings be, and they are hereby, dismissed.

By the Commission.

[Seal] George W. Laird, Secretary

Filed 11/5/54

Before the Interstate Commerce Commission

No. 29974—Acme Peat Products, Ltd., et al., vs. Akron, Canton & Youngstown Railroad Company, et al.

No. 30260—Alouette Peat Products, Ltd., vs. Atchison, Topeka & Santa Fe Railway Company.

Plaintiffs' Exhibit No. 2—(Continued)

PETITION FOR RECONSIDERATION OF
THE COMMISSION DECISION DATED
OCTOBER 4, 1954

Preface

The Commission decision in this case on the applicability of the rates is directly in violation of the U. S. Supreme Court decision in the following case: Illinois Central Railroad Co. vs. Van Dusen Harrington Co. (1927), 212 N.W. 940 (Minnesota), Certiorari Denied, 275 U. S. 557.

There the U. S. Supreme Court, by denying certiorari, held that where publication of a rate was not made on statutory notice as required by Section 6 of the Act, nor under authority of the short notice order of the Interstate Commerce Commission, that the filed rate was not applicable. That situation is almost identical to the one involved here.

In the following petition for reconsideration under Section 6, the specific legal reasoning on the facts herein involved is set forth.

Because of the conflict of the Commission decision here with the Supreme Court ruling outlined above, as reconfirmed in other Supreme Court cases, reconsideration should be granted.

Preliminary Statement

Reconsideration by the entire Commission of their adverse order to complainants dated October 4, 1954, is respectfully requested. In the confusing

Plaintiffs' Exhibit No. 2—(Continued)

pleadings and cross-pleadings over this six year litigation period, key evidence and law has been omitted, particularly regarding the applicability of the assailed increase.

This case involves carload shipments of peat from British Columbia to points in the United States during the year 1947 and the first three months of 1948. The entire problem involves the Ex Parte 162 increase. The railroads subsequent to those dates changed their tariffs to comply with the Commission order. The question is solely the legal applicability under Section 6 and the reasonableness under Section 1 and the prejudice under Section 3. The big error of law was made on the applicability of the increase.

From a public policy standpoint the decision of the Commission of October 4th is bad. That decision in effect gives the railroads a "blank check" to violate Commission orders with impunity. It shifts the burden caused by the Commission-found censorable acts of the railroads to the shippers and the Commission. There is no question the railroads violated the I. C. C. order in Ex Parte 162. There is no question that they charged west coast shippers a full 20% increase while giving their eastern competitors only a 6c per 100 lbs. maximum increase. As the decision stands now, the railroads go scot free, the very sole of equity is violated, and the Interstate Commerce Commission is put into a position where their orders in general increase cases mean virtually nothing as maximum orders.

Plaintiffs' Exhibit No. 2—(Continued)

The Commission overlooked in this case one all-important legal point which can solve the entire matter involved here, and which will give the Commission orders in Ex Parte increase cases some "teeth" which they now lack.

Legally there was no authority for any increase on peat on January 1, 1947. The increase legally could only be applied when the carriers published their tariffs in compliance with Section 6 (3) of the Act.

We have set forth in part I below the step-by-step legal reasoning, which if followed by the Commission in this case, (1) solves this case with fairness to the small shippers involved; (2) in the future forces the railroads in Ex Parte cases to meticulously comply with I. C. C. orders or lose any increase until they do; and (3) gives the railroads exactly what the I. C. C. finds proper and nothing more.

For the reasons outlined below, we respectfully urge reconsideration, for substantial error of law has been made. If reconsideration is granted because of the error in the applicability of the rates involved here, no decision is necessary under Sections 1 or 3 of the Act. Decision under Section 6 would conclude the case. The complaint in this case specifically alleges and covers the Section 6 violation. The law is clear. The complaint is complete on all counts. Our reasons for reconsideration follow below.

Plaintiffs' Exhibit No. 2—(Continued)

I.

The Assailed Rates Were Violations of Section 6
The defendants' rate increase (in its entirety) involved here on peat was wholly illegal. Here are the specific legal authority why the I. C. C. must reverse its finding that the rates were applicable. The increased rates on peat were not legally published.

(1) Only rates which are legally filed and published can be applied. The point is so well established citation is unnecessary. The rates to be binding must meet the requirements of Section 6(3) of the Act. Legal notice of rates is chargeable only when the rates are legally published.

The U. S. Supreme Court said:
"Tariffs filed with the Commission without statutory authorization conveys no notice." *Southern Pacific vs. U. S.*, 272 U. S. 445. (Underscoring line.)

That is the situation here on peat.
"A change in a rate must be in the way prescribed by law." *U. S. vs. Standard Oil Co.*, 148 Fed. 719.

"A carrier may not arbitrarily set aside its tariff provisions without due notice in the proper form." *Lexington Elevator & Mill Co. vs. B. & O. Railroad Co.*, 109 I. C. C. 542.

"Special permission granted carriers to establish rates on less than statutory notice has no effect on rates until they have been filed in accordance with

Plaintiffs' Exhibit No. 2—(Continued)

requirement of the Act." Oklahoma Portland Cement Co. vs. A. T. & S. F., 93 I. C. C. 203.

(2) The assailed rate increase was inapplicable for the reason they failed to comply with the law. The law of the land is clear. Section 6(3) of the Interstate Commerce Act is specific. It says:

"No change shall be made in the rates, fares and charges or joint rates, fares and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares or charges will go into effect; and the proposed changes shall be shown by printing new schedules or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: Provided that the Commission may, in its discretion and for good cause shown, allow changes upon less than notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions * * *" (Underscoring mine.)

(3) The only authority for less than that legal statutory notice of thirty days filing, etc., in this case must be in the Commission's order in "Ex

Plaintiffs' Exhibit No. 2—(Continued)

Porte 162. Increased Railway Rates, Fares & Charges, 1946", 266 I.C.C. 537, 617.

That order, Finding 14, on page 617, giving short notice publication authority, said:

"The increases in freight rates and charges herein authorized shall supersede and be in lieu of the emergency increases authorized in our prior (interim) report and order of June 20, 1946. The authorized increased rates and charges may be made effective in the period January 1, 1947 to February 28, 1947, upon not less than five days' notice to the Commission and to the general public, by filing and posting in the manner prescribed in the Interstate Commerce Act." (Underscoring mine.)

(4) The only I.C.C. authorized increase on peat in Ex Parte 162 order was a 20% increase subject to a 6c maximum increase per 100 pounds.

Finding 3 in that order, insofar as it applies to peat, reads as follows:

"The basic freight rates and charges on the commodities specified in Appendix 1 (which covers peat) may be increased by the specific percentages or amounts shown therein (on peat 20% increase, subject to a maximum of 6c per 100 pounds), and such rates increased as provided therein, will be just and reasonable for the future." (Parentheses insertions mine.)

That point is not debatable, for the railroads, and the entire Commission twice have found that is just what the Ex Parte 162 order said.

Plaintiffs' Exhibit No. 2—(Continued)

(5) The defendants admittedly did not comply with that Ex Parte 162 order on peat. The five days' notice authority applied only to the increases authorized in that order.

(6) The tariff filed by the defendants effective January 1, 1947 was not authorized by the Interstate Commerce Commission on peat.

(7) We then have the situation of the defendants trying (and succeeding) in charging the shippers a 20% increase on peat (in 1947 and part of 1948) under a claim that the increase was "published" with legal notice.

(8) Actually there was no publication of any kind as required by law. The Ex Parte 162 tariff order did not authorize a "publication" of a full 20% increase on peat with no 6c maximum. Therefore there was no five day authority to increase peat rates by 20% to be effective January 1, 1947.

(9) Manifestly the carriers did not make any tariff publication on thirty days' notice increasing peat rates a flat 20%. There was no publication on statutory notice required by Section 6 of the Act.

(10) Therefore there was no publication authorized by the Ex Parte 162, nor otherwise. Without such legal publication the defendants cannot legally charge the 20% increase they did on January 1, 1947.

Publication of rates required by law is all essential. Without legal publication no rate increase could be applied.

The courts have said:

Plaintiffs' Exhibit No. 2—(Continued)

"A change in rates must be made in the way prescribed by law." U. S. vs. Standard Oil Co., 148 Fed. 719. Also "American Sugar Refining Co. vs. D. L. & W. Railroad Co.", 207 Fed. 733.

(11) This is no case of an erroneously "published" rate being legally applicable even though in contravention of an I. C. C. order. There actually was no legal publication of any kind. There is no authority of any kind for a flat 20% increase on peat.

(12) Mere I. C. C. filing of the X-162 Increase Tariff (Agent L. E. Kipp's X-162, I. C. C. A-3657) did not legalize a flat 20% increase on peat under Section 6 of the Interstate Commerce Act. Thirty days' notice was not given. The short notice publication authorized by the Interstate Commerce Commission in its Ex Parte 162 order manifestly did not authorize the flat 20% increase on peat.

Section 6 of the Act required thirty days' notice or "for good cause shown" to allow lesser time notice. Here the I. C. C. order in Ex Parte 162 (decided December 5, 1946) did not authorize the short notice on that peat increase. No other order "for good cause shown" authorized the excessive peat rate increase. Nothing was "shown". No "good cause" was even hinted. The January 1, 1947 increase of 20% on peat was without even a shadow of legal authority. Mere "filing of a tariff with the I. C. C." does not reach the legal requirements of the second part of Section 6 (3) of the Act.

(13) The only legal rates which were applicable

Plaintiffs' Exhibit No. 2—(Continued)

were the basic rates in effect on June 30, 1946 on peat. Those rates remain in effect. The increase of January 1, 1947 cannot be applied to peat for the reasons outlined above. The temporary 6% (X-148) increase authorized in the June 20, 1946 order in Ex Parte 162, 264 I. C. C. 695, cannot be continued after December 31, 1946 on peat because the railroads cancelled those tariffs in their entirety on all traffic (including peat traffic), in Agent L. E. Kipp's 2-P, I. C. C. 1527, Supplement 10, page 2; and in Agent W. J. Bohon's 65-F, I. C. C. 77, Supplement 90, page 2; and in Agent J. P. Haynes' 1-S, I. C. C. 1352, Supplement 53, page 2.

Therefore, the basic peat rates legally remained on all identified shipments (on the appendix to the complaint) until the following dates from January 1, 1947 to:

W. T. L., Illinois & S. W. L. Territory to December 1, 1947.

Official Territory Area to February 1, 1948.

Southern Territory Area to March 29, 1948.

Southern California Area to January 1, 1948.

Northern California Area to March 5, 1952.

Mountain-Pacific Territory (Balance) to March 29, 1948.

(14) Sound public policy supports the conclusion here set forth. Right now the Interstate Commerce Commission says the railroads are subject to censure for their action here. The carriers did wrong, yet the I. C. C. (rightly or wrongly) says it can do nothing to correct the injury to the victims.

Plaintiffs' Exhibit No. 2—(Continued)

In effect, the Interstate Commerce Commission by this peat decision is giving the railroads a "blank check" to violate I. C. C. orders with impunity.

This new approach will give the Interstate Commerce Commission some "teeth" to force meticulous compliance with their future orders. This puts the burden on the carriers to obey the I. C. C. order or lose any increase until they do.

That is fair to shippers. They won't have to sue on every illegally-padded rate to get what the I. C. C. ordered. This is fair to the railroads, for if they do the job right, they get everything the I. C. C. ordered for them. It prevents railroad wrongs forming the basis for the railroads' unjustified enrichment. This is fair to the Interstate Commerce Commission, for it gives the I. C. C. an enforceable power to see that their orders are complied with.

II.

The Reconsideration Order on Which the Last Commission Order Was Based Is Improper

The whole order of October 4, 1954 and decision is improper in that it is based on "Petition of Defendants" dated March 2, 1954. That petition is in violation of Rule 101 (f) of the Commission Rules of Practice promulgated under Section 17 of the Interstate Commerce Act. The Commission entertained two (2) successive petitions on the same ground. That is improper.

The Commission has said:

"The law contemplates that the Commission

Plaintiffs' Exhibit No. 2—(Continued)
make rules of practice, and compliance is in the interest of justice to all parties.”

Paducah Board of Trade vs. I. C. R. Co., 43
I.C.C. 537.

Railroad Comm. of Wisconsin vs. Aberdeen
R. R. Co., 142 I. C. C. 199.

The Commission rules have the power of law. Unless they are complied with, the pleadings are improper.

Purse Bros. vs. N. C. & St. L. Ry., 221 I.C.C.
4, 5.

It is manifestly improper to allow the railroads here the right to violate the General Rules of Practice and restrict all other practitioners to the rules. Complainants have not been given due process of law required by the Constitution.

The defendants' petition for reopening and reconsideration should have been summarily declined without any further action.

III.

The I. C. C. Has Directly Conflicting Findings In This Case

The whole problem originated in Ex Parte 162, Increased Railway Rates, Fares & Charges, 1946, 266 I. C. C. 537, 615, 623. There the Commission found, on page 615,

“The basic rates and charges on the commodities (which includes peat) specified in Appendix I may be increased by the specific percentages or amounts shown therein, and such rates increased as pro-

Plaintiffs' Exhibit No. 2—(Continued)

ded therein, will be just and reasonable for the future." (Underscoring mine.)

Today, in 1954, in this case, all the Commissioners who were on the Commission then reaffirmed their 1946 decision. The injury involved herein took place in 1947 and early 1948 as a result of that 1946 decision. The new members of the Commission who were not on the Commission in 1946, 1947 or 1948 now have the Commission finding in direct conflict with its 1946 finding on the same commodity on the same increase. Here they find:

"Upon reconsideration, we find that the assailed rates were applicable, and are not shown to have been unjust, unreasonable or otherwise unlawful." (Sheet 6-7) (Underscoring mine.)

Such conflicting finding cannot possibly be reconciled. The Commission erred here in substituting its decision on a 1954 case for the considered and unanimous judgment of the Commission in 1946. It is patently unjust to evaluate 1947 records and earnings on 1954 standards. That was done here.

IV.

The Commission Erred in Their Finding That the Rates Were Not Unduly Prejudicial and in Violation of Section 3. (Sheet 2)

Counsel for the railroad defendants frankly stated (page 185, Oral Argument—11/17/49),

"I agree with counsel (for complainants) that he showed through his witnesses that because the com-

Plaintiffs' Exhibit No. 2—(Continued)

plainants' rates were raised relatively higher than the rates of their competition had been raised from the sources of supply in Wisconsin and Eastern Canada, it was more difficult for them to reach the Midwestern and Eastern markets."

On page 188 of the same Oral Argument, defendants' counsel admitted:

"I will also concede with counsel that in the East and the South peat is carried with the fertilizer group and therefore is grouped in your tariffs under your fertilizer rates."

Complainants showed direct and specific injury under Section 3 to support an award of damages under Section 3 and also Sections 1 and 6. (See T. 16, 21, 22, 23, 24, 99, etc.) The Commission erred in ignoring this evidence.

V.

The Commission Erred in Making No Finding of Fact to Support Its Conclusion of Law That the Assailed Rates Were Not Unreasonable.

The defendants' own chief counsel admitted that the basic rate plus 6 cents was just and reasonable. He said, (T. 190)

"We feel it is a just and reasonable rate, but we put it in because in our discretion we were losing traffic and revenue."

The same defendants admitted (T. 193) their Ex Parte increase brought about varying results in different sections of the nation.

Defendants voluntarily reduced their high rates

Plaintiffs' Exhibit No. 2—(Continued)

on peat in eleven months after they increased it. It was more than the traffic could bear.

Look at the lowest carload rates to a common destination such as Chicago in 1947 before any Ex Parte increase:

From British Columbia to Chicago, Ill.: \$0.72.

From New York Port to Chicago, Ill.: \$0.38* (European Imports).

From New Orleans Port to Chicago, Ill.: \$0.30* (European Imports).

From Port Colbourne, Ont. to Chicago, Ill.: \$0.30.

* Carriers absorb terminal charges and carloading expenses and give two cars for one on shipments imported.

Exhibit 6 sets forth the fact that on peat the assailed rates are the highest in the nation. If the basic rates are the highest in the U. S. on peat by any standard, how can it be reasonable to increase them 20% more and then increase the lesser competitive rates only 6c per 100 pounds?

Nowhere does the Commission set forth one single finding to support its conclusion of law that the assailed rates were not unreasonable. They merely said:

"There is no evidence that can be said to afford a sound basis for a finding of unreasonableness."
(Sheet 6)

There must be a specific finding of fact to support a conclusion of law.

To look at earning on 1947 traffic seven years later in 1954 is like comparing prices on coffee to-

Plaintiffs' Exhibit No. 2—(Continued)

day with what they were in 1947. Inflation has come. It is difficult for people today to properly evaluate 1947 evidence.

The so-called reduction in the basic peat rates prior to World War II on which defendants place so much emphasis is fantastic. All they did was establish commodity rates on peat to take care of prospective traffic that did develop. Everyone knows class rates from, to and within Mountain-Pacific Territory move virtually no carload traffic. Peat was no exception. Normal commodity rates to replace the impossible class rates (now under I. C. C. investigation) was all that was done. They set those rates to the limit the market would stand, as this case proves. We are not dealing with depressed rates in any sense.

This is a very, very cheap commodity selling for from slightly over 11½ cents to 13¼ cents per pound, packed in bales and loaded in a box car. There were totally negligible loss and damage claims. There was a regular year in and year out movement until these freight increases killed it. There is every basis on record to find the uneven increase unjust and unreasonable.

VI.

The Commission Erred in Using the "Bolgiana" Case as Precedent in This Case

The majority of the I. C. C. held the "F. W. Bolgiana & Co., Inc., vs. B. & O. R. Co.", 291 I. C. C. 659, supporting precedent for their decision here.

Plaintiffs' Exhibit No. 2—(Continued)

The factual situation here is wholly dissimilar. There the I. C. C. had earlier prescribed maximum reasonable rates on humus. The assailed rates were here less than the I. C. C. prescribed rates. The Commission did have a difficult situation there.

Here no such I. C. C. prescribed rates are involved. All involved rates are carrier-made rates.

Here in this peat case we have the basic peat rates long-established and maintained by the railroads. That is the best possible proof of reasonableness, all factors considered. See *Skinner & Eddy Corp. vs. U. S.*, 249 U. S. 557.

The Commission made a very substantial error in throwing this case into the principle decided in the "Bolgiana" case.

Conclusion

This petition is properly filed within sixty days of the Commission order in accordance with Rule 101 (e) of the General Rules of Practice. No prior petition for reconsideration has been made. The point involved is a crucial one, both for the small shippers here and for the good of the Commission as a whole.

We do feel that the errors of law and the confusions of this case have created a situation which is not good for the good of the Commission nor for the public as a whole. The point is important for these shippers today, but for all the public tomorrow. We believe an oral argument clearly and concisely going over the matters raised herein is in the

Plaintiffs' Exhibit No. 2—(Continued)
interests of all. We respectfully request oral argument.

Respectfully submitted,

/s/ Fred H. Tolan,
Registered Practitioner

Certificate of Service attached.

* * * * *

Filed 1/15/55

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 3rd day of January, A.D. 1955.

No. 29974—Acme Peat Products, Ltd., et al., vs. Akron, Canton & Youngstown Railroad Company, et al.

No. 30260—Alouette Peat Products, Ltd., vs. Archison, Topeka & Santa Fe Railway Company.

Upon consideration of the record in the above-entitled proceedings, petition of complainants for reconsideration and oral argument, and the reply of defendants; and it appearing that petitioners have not shown substantial and material reasons to warrant granting their petition:

It is ordered, That said petition be, and it is hereby, denied.

By the Commission.

[Seal]

George W. Laird, Secretary

SUPPLEMENT No. ... TO TARIFF No. ... I. C. C. No. ...

L. SUPPLEMENT TO C. T. C.
D STATE COMMISSION
MEMBERS SHOWN HEREINSPECIAL SUPPLEMENT TO I. C. C.
NUMBERS SHOWN HEREIN**SPECIAL SUPPLEMENT TO TARIFFS**

ISSUED BY

TRANS-CONTINENTAL FREIGHT BUREAU**L. E. KIPP, AGENT**

AND BY HIM JOINTLY WITH

DOE, Agent

W. S. CURLETT, Agent**B. T. JONES, Agent****APPLYING IN CONNECTION WITH****PARTICIPATING CARRIERS SHOWN IN TARIFFS AND SUPPLEMENTS
THERETO ENUMERATED HEREIN****INCREASE IN RATES AND CHARGES**

cept as otherwise provided, rates and charges in Tariffs enumerated herein and in prior supplements thereto, to each tariffs this is a special supplement are hereby increased as provided in Tariff of Increased Rates and Charges No. X-162, E. Kipp's I. C. C. No. A-3657, M. F.-1, C. C. No. A-190, C. T. C. No. A-966, P. U. C. Ore. No. 118, supplements thereto and all other issues thereof.

provisions of this supplement (including the cancellation of prior supplements and the cancellation on page 2 hereof) shall apply.

to rates on intrastate traffic moving between points in, and transported wholly within, the State of Oregon, nor to charges on intrastate traffic, nor

to any rate applicable via an interstate route on a given interstate shipment moving between points in Oregon, between which points there is an intrastate rate of the same amount applicable on a like shipment via any route wholly within the State of Oregon in any tariff on file with the Interstate Commerce Commission nor to charges applicable in connection with said interstate shipment

authorized by a letter-number (e. g., K-1, K-2, etc.) supplement to Tariff of Increased Rates and Charges referred to which shall specify the increases applicable to such rates and charges, and which shall be filed with the Interstate Commerce Commission and State Commission.

provisions of this supplement will **not** apply between points in, and transported wholly within the Dominion of Canada and points in Canada moving through points in the United States.

a tariff enumerated herein or a prior supplement thereto contains rates or charges to become effective upon a date subsequent to the effective date of this supplement, such rates or charges will, on their effective date, be increased as provided in Tariff of Increased Rates and Charges referred to above.

the form of this special supplement is permitted by authority of Interstate Commerce Commission, Permission No. 31715, dated December 19, 1946.

ISSUED DECEMBER 21, 1946**EFFECTIVE JANUARY 1, 1947**

is supplement is exempt from the terms of Rule 9 (c) of Tariff Circular No. 20 under permission of the Interstate Commerce Commission No. 31715 of December 19, 1946.

issued on five days' notice under authority of order dated December 5, 1946, of the Interstate Commerce Commission Order No. 162 and Ex Parte No. 148, and Board of Transport Commissioners for Canada Order No. 68340 of December 19, 1946.

W. S. CURLETT, Agent,
143 Liberty Street,
NEW YORK 6, N. Y.

B. T. JONES, Agent,
808 South Dearborn Street,
CHICAGO 5, ILL.

I. N. DOE, Agent,
524 South Station,
BOSTON 10, MASS.

ISSUED BY

L. E. KIPP, Agent,
516 West Jackson Blvd.,
CHICAGO 6, ILL.

(File No. 6 - Junabo Sup. 94-M)

CANCELLATION

All provisions in Tariffs enumerated herein, or in supplements thereto, which subject Rates and Charges in said Tariffs and supplements thereto to Tariff of Increased Rates and Charges No. X-148, Agent L. E. Kipp's I. C. C. No. A-3886, M. F. I. C. C. No. A-117, C. T. C. No. A-890, Ore. P. U. C. No. 87, are hereby cancelled.

All rates in Tariffs enumerated herein, or in supplements thereto, which are not subject to Tariff of Increased Rates and Charges No. X-148 referred to above and which are published as being applicable until modified or terminated in further proceedings in Ex Parte 148-162, or other proceedings, are hereby cancelled. Rates and Charges which were temporarily superseded thereby again become effective, subject to the provisions of Tariff of Increased Rates and Charges No. X-162 referred to on the title page hereof.

LIST OF TARIFFS SUPPLEMENTED HEREBY

Supplement No.	TO (L. E. Kipp, Agent, except as noted)				COMMODITY
	Tariff No.	I. C. C. No.	C. T. C. No.	State Commission Nos.	
97	1-Y	1507 ① 512 ② A-809 ③ 3905 MF-B-31	801 ① 432 ② A-548 ③ 1910		General Commodities.
		1524 ① 547 ② A-846 ③ 4049 MF-B-45	820 ① 462 ② A-576 ③ 1970		
(320)	1-Z				General Commodities.
10	2-P	1527 MF-B-46	822		General Commodities.

ISSUING AGENTS	I. C. C. No.	MF- I. C. C. No.	C. T. C. No.	STATE COMMISSION Nos.
Bohon.....	771	6	315	P. U. C. Idaho 440, Mont. R. C. 51, Ore. P. U. C. 670, Wash. D. T. 787.
Curlett.....	A-855	A-61	A-584	K. R. C. A-16, P. S. C. Md. A-55, P. U. C. N. J. A-31, P. S. C. N. Y. A-149, Pa. P. U. C. A-124, Vt. P. S. C. A-28, V. C. C. A-68, P. S. C. W. Va. A-85.
Dodge.....	695	22		Texas R. C. 228.
Do.....	552	73	465	Conn. P. U. C. 14, Maine P. U. C. 48, Mass. D. P. U. 54, New Hampshire P. S. C. 41, P. S. C. N. Y. 62, R. I. P. U. A. 37, Vt. P. S. C. 42.
Engdahl, Alt.....	96		20	
Flynn.....	80		551	
Gallup.....	286	8	2	V. C. C. 2.
Haynes.....	1485	59	165	Ariz. C. C. 353, Cal. R. C. 135, P. U. C. Idaho 305, Mont. R. C. 7, P. S. C. Nev. 354, S. C. C. New Mex. 171, Ore. P. U. C. 895, P. S. C. Utah 195, Wash. D. T. 158, P. S. C. Wyo. 11.
Hoke.....	1077	391	225	Ill. C. C. 46, @Ind. R. C. 30, K. R. C. 311, N. C. U. C. 183, Ohio P. U. C. 106, V. C. C. 264.
Jones.....	4089	137	1986	Ill. C. C. 553, @Ind. R. C. D-765, K. R. C. 98, Mich. P. S. C. 695, P. S. C. Mo. 187, P. S. C. N. Y. 278, Ohio P. U. C. 2184, Pa. P. U. C. 326, P. S. C. W. Va. 299.
M. King.....	12	4	3	
Opp.....	A-3657	A-190	A-966	Ark. P. S. C. 70, Ariz. C. C. 7, Cal. R. C. 60, Colo. P. U. C. 315, P. U. C. Idaho 162, Ill. C. C. 350, Mich. P. S. C. 378, Minn. R. C. 348, P. S. C. Mo. 838, Mont. R. C. 103, P. S. C. Nev. 40, S. C. C. New Mex. 78, No. Dak. P. S. C. 170, Ore. P. U. C. 118, Texas R. C. 28, P. S. C. Utah 96, Wash. D. T. 102, P. S. C. Wyo. 246.
Marsh.....	3733	97	573	Ark. P. S. C. 301, P. U. C. Colo. 57, P. U. C. Idaho 74, Ill. C. C. 46, P. S. C. Mo. 638, S. C. C. New Mex. 61.
Matthews.....	148		1412	
Oliphant.....	A-69	3		Ill. C. C. A-17.
Raasch.....	524	57	85	Ill. C. C. 311, @Ind. R. C. 158, P. S. C. Mo. 70.

TARIFF OF INCREASED RATES AND CHARGES No. X-162

APPLYING FOR ACCOUNT OF
ALL CARRIERS AS SHOWN IN TARIFFS AND SUPPLEMENTS THERETO MAKING
SPECIFIC REFERENCE HERETO

SPECIAL NOTICE

This Tariff is Applicable Only in Connection With Tariff Publications Making Specific Reference
To This Tariff and to the Extent Indicated in Such Tariff Publications

THIS TARIFF MUST BE POSTED AT ALL STATIONS AT WHICH TARIFFS OR
SUPPLEMENTS MAKING REFERENCE HERETO ARE POSTED

This schedule contains rates that are departures from the terms of the amended Fourth Section of the Interstate Commerce Act, under authority of Interstate Commerce Commission, Fourth Section Order No. 15650 of December 5, 1946.
The increase in rates and charges provided herein which result in departures from outstanding orders of the Interstate Commerce Commission is published under authority of Order dated December 5, 1946, of the Interstate Commerce Commission Order No. 162 and Ex Parte 148.

The form of this tariff is permitted by authority of Interstate Commerce Commission, Permission No. 31715 of December 5, 1946.

DECEMBER 21, 1946

EFFECTIVE JANUARY 1, 1947

(Except as otherwise provided herein)

Issued on five (5) days' notice under authority of Order dated December 5, 1946, of the Interstate Commerce Commission, Order No. 162 and Ex Parte 148, Board of Transport Commissioners for Canada, Order No. 68340 of December 19, 1946, and the authorities of State Commissions shown on page 2.

Indiana intrastate traffic, effective January 3, 1947.

ISSUED BY

BOHON, Agent,
Union Station,
Little 4, Wash.
CURLETT, Agent,
13 Liberty St.,
New York 6, N. Y.
DODGE, Agent,
North Poydras St.,
Dallas 2, Tex.
DOE, Agent,
124, South Station,
Boston 10, Mass.

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44 C. P. R. Office Building,
Winnipeg, Man.
E. C. GALLUP, Agent,
140 Cedar St.,
New York 6, N. Y.
J. P. HAYNES, Agent,
717 Market St.,
San Francisco 3, Cal.

R. H. HOKE, Agent,
101 Marietta St.,
Atlanta 3, Ga.
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Chicago 5, Ill.
JULIAN M. KING, Agent,
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407 McGill St.,
Montreal 1, Que.
W. G. O'LEAHANT, Agent,
611 Gravier St.,
New Orleans 12, La.
R. G. RAASCH, Agent,
516 W. Jackson Blvd.,
Chicago 6, Ill.

R. A.)

DATE RECEIVED

Month.....Day.....Year.....

INCREASES IN LINE-HAUL CARLOAD RATES ON COMMODITIES NAMED IN ITEMS NOS. 15 TO 299

The line-haul carload rates on the commodities named in Items Nos. 15 to 299, inclusive, are increased as provided in such items.

Item No.	COMMODITY	INCREASE
103	Earth, diatomaceous or infusorial	Apply Table 1, maximum 6 cents per 100 pounds, or \$1.20 per net ton.
105	<p>Feed, Animal or Poultry, viz.:</p> <p>Biscuits, Dog, whole, broken or ground</p> <p>Blood Flour; Blood or Meat Meal; Feeding Tankage or Dried Meat Scraps</p> <p>Bone Meal or Ground Bone (See Note 1)</p> <p>Feed, Animal or Poultry (NOIBN)</p> <p>Fish Food, NOIBN</p> <p>Fish Scrap and Fish Meal</p> <p>Flavin Concentrate</p> <p>Milk, Buttermilk or Whey, condensed or dried (See Note 1)</p> <p>Milk Powder Scrap, cake or ground, or Whey Refuse (Milk Albumen) dry or Sour Skim Milk</p> <p>Poultry Grit</p> <p>Note 1—Containers must be so branded, labeled or marked as to plainly indicate that they contain Animal or Poultry Feed.</p>	See ⑥.
107	Fertilizer and articles listed in tariffs making reference to this tariff, as and when taking fertilizer rates	Apply Table 1, maximum 6 cents per 100 pounds, or \$1.20 per net ton.

* * * * *

[Endorsed]: No. 15276, 77. United States Court of Appeals for the Ninth Circuit. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Union Pacific Railroad Company, Southern Pacific Company, Great Northern Railway Company and Northern Pacific Railway Company, Appellants, vs. Alouette Peat Products, Ltd., et al., Appellees. Interstate Commerce Commission, Appellant, vs. Alouette Peat Products, Ltd., et al., Appellees. Transcript of Record. Appeals from the United States District Court for the Western District of Washington, Northern Division.

Filed: September 14, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

lishing tariffs on shortened notice, not authorized by Ex Parte 162 referred to in the Findings herein, was illegal and void. That accordingly the defendant carriers were not entitled either to exact the 20% increase or the 6 cent maximum permitted under Ex Parte 162. That the rates which were in effect immediately before the initiation of the proceedings by the defendant railroads for the purpose of obtaining an increase in the rates were the legal rates applicable to these shipments here in question at the time they were made, and that all rates applied to plaintiffs' shipments and all sums of money exacted from plaintiffs by applying such freight rates to the extent of the excess of such rates over said prior existing approved rates are and were illegal and void and without legal right, since said rates were not authorized by law nor promulgated in the manner provided by law nor in the manner specifically and expressly conditioned by the Interstate Commerce Commission." (Conclusion of Law No. II.)

III.

The District Court erred in concluding—
"That the Interstate Commerce Commission violated its own rules and as a result thereof denied the plaintiffs due process by granting a second petition of the railroads for reconsideration as more particularly set forth in its Order of June 21, 1954." (Conclusion of Law No. IV.)

IV.

The District Court erred in concluding—

“That the plaintiffs are entitled to judgment against the defendants, and each of them directing that the orders heretofore made by the Interstate Commerce Commission be reversed, and that these causes above-captioned be remanded to the Interstate Commerce Commission for the fixing of the amount of reparations due the plaintiffs, together with interest thereon, and the entry of a reparations order consistent with the findings of fact, conclusions of law and judgment herein entered.” (Conclusion of Law No. V.)

V.

The District Court erred in failing to sustain the Commission’s conclusion that the complainants before it had failed to establish any violation of the Interstate Commerce Act for which they were entitled to reparation.

VI.

The District Court erred in entering judgment remanding the proceedings to the Commission for the purpose of entering a reparation order.

Designation

The Interstate Commerce Commission adopts as and for its Designation of Record for printing those portions of the record herein designated by the appellant railroads and, in addition thereto, the following:

1. Answers of the United States of America.
2. Intervention and Answers of the Interstate Commerce Commission.
3. The following portions of the record before

the Interstate Commerce Commission in Docket No. 29974 as certified by said Commission to the District Court:

- (a) Commission report and order dated April 7, 1950;
- (b) Commission order dated January 7, 1952;
- (c) Commission order dated December 30, 1953;
- (d) Petition for leave to file petition to reopen and reconsider received March 8, 1954;
- (e) Petition to reopen for reconsideration filed June 21, 1954;
- (f) Commission order dated June 21, 1954;
- (g) Report and order of the Commission on reconsideration filed October 4, 1954;
- (h) Petition for reconsideration filed November 1954;
- (i) Commission order dated January 3, 1955.

4. Notice of Appeal by Interstate Commerce Commission.

5. This Statement of Points on which appellant, Interstate Commerce Commission, intends to rely on appeal and designation of portions of record to be printed.

Dated at Washington, D. C., this 21st day of September, 1956.

/s/ ROBERT W. GINNANE,
General Counsel

/s/ C. H. JOHNS,
Assistant General Counsel, Interstate Commerce
Commission, Washington 25, D. C.

[Endorsed]: Filed September 25, 1956. Paul P. Brien, Clerk.

In the United States Court of Appeals
for the Ninth Circuit

No. 15277

CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY, et al.,
Appellants,

vs.

ACME PEAT PRODUCTS, LTD., et al.,
Appellees.

STATEMENT OF POINTS ON WHICH IN-
TERVENING RAILROAD APPELLANTS
INTEND TO RELY ON APPEAL, AND
DESIGNATION OF PORTIONS OF THE
RECORD TO BE PRINTED

Points

The points upon which the intervening railroad appellants intend to rely on appeal are as follows:

I.

The District Court erred in finding and concluding that the intervening railroad appellants, when they published their rates, failed to comply with the order of the Interstate Commerce Commission, dated December 5, 1946, entered in Ex Parte 162, Increased Railway Rates, Fares and Charges, 1946. (Findings of Fact Nos. V and VI, Conclusion of Law No. II.)

II.

The District Court erred in finding that the intervening railroad appellants, in increasing their

ates, damaged the appellees. (Finding of Fact No. VII.)

III.

The District Court erred in concluding—

“That the action of the defendant carriers in publishing tariffs on shortened notice, not authorized by Ex Parte 162 referred to in the Findings herein, was illegal and void. That accordingly the defendant carriers were not entitled either to exact the 20% increase or the 6 cent maximum permitted under Ex Parte 162. That the rates which were in effect immediately before the initiation of the proceedings by the defendant railroads for the purpose of obtaining an increase in the rates were the legal rates applicable to these shipments here in question at the time they were made, and that all rates applied to plaintiffs’ shipments and all sums of money exacted from plaintiffs by applying such freight rates to the extent of the excess of such rates over said prior existing approved rates are and were illegal and void and without legal right, since said rates were not authorized by law nor promulgated in the manner provided by law nor in the manner specifically and expressly conditioned by the Interstate Commerce Commission.”

(Conclusion of Law No. II.)

IV.

The District Court erred in concluding—

“That the Interstate Commerce Commission violated its own rules and as a result thereof denied the plaintiffs due process by granting a second peti-

tion of the railroads for reconsideration as more particularly set forth in its Order of June 21, 1954.” (Conclusion of Law No. IV.)

V.

The District Court erred in concluding—

“That the plaintiffs are entitled to judgment against the defendants, and each of them directing that the orders heretofore made by the Interstate Commerce Commission be reversed, and that these causes above-captioned be remanded to the Interstate Commerce Commission for the fixing of the amount of reparations due the plaintiffs, together with interest thereon, and the entry of a reparations order consistent with the findings of fact, conclusions of law and judgment herein entered.” (Conclusion of Law No. V.)

VI.

The District Court erred in failing to sustain the Interstate Commerce Commission’s conclusion that the appellees failed to establish any violation by the intervening railroad appellants of the Interstate Commerce Act or orders of the Interstate Commerce Commission for which they were entitled to damages.

VII.

The District Court erred in entering judgment reversing the order of the Interstate Commerce Commission dismissing appellee’s complaint before the Interstate Commerce Commission and remanding the proceedings to the Commission.

Designation

The intervening railroad appellants designate for printing by the Clerk of this Court the following portions of the record filed with this Court:

1. Complaints.
2. Petitions of intervening railroad appellants to intervene.
3. Orders granting leave to intervening railroad appellants to intervene.
4. Answers of intervening railroad appellants.
5. Stipulation for consolidation.
6. Order consolidating actions.
7. Those portions of the record before the Interstate Commerce Commission in Docket 29974 as certified by said Commission to the District Court, as follows:

(a) Transcript of the stenographer's notes of the administrative hearing held at Seattle, Washington on November 10, 1948;

(b) Exhibits Nos. 1 to 10, both inclusive, and Nos. 12 to 23, both inclusive, received in evidence at the administrative hearing held at Seattle, Washington, on November 10, 1948;

(c) Report proposed by George J. Hall and L. H. Dishman, Examiners, filed July 12, 1949;

(d) Commission report and order dated April 17, 1950;

(e) Commission order dated January 7, 1952;

(f) Commission order dated December 30, 1953;

(g) Petition for leave to file petition to reopen and reconsider received March 8, 1954;

(h) Petition to reopen for reconsideration filed June 21, 1954;

- (i) Commission order dated June 21, 1954;
- (j) Report and order of the Commission on reconsideration filed October 4, 1954;
- (k) Petition for reconsideration filed November 5, 1954;
- (l) Commission order dated January 3, 1955.

8. Stenographer's notes of the proceedings had before the District Court, including the transcript of testimony, oral opinion of the Court, statements of Court and counsel on settling of findings of fact, conclusions of law and judgment.

9. Findings of Fact and Conclusions of Law, dated June 19, 1956.

10. Judgment, dated June 19, 1956.

11. Notice of appeal by the intervening railroad appellants.

12. Statement of points on which intervening railroad appellants intend to rely on appeal, and designation of portions of the record to be printed.

Dated at Seattle, Washington, this 2nd day of October, 1956.

/s/ HAROLD G. BOGGS,
/s/ ROBERT F. GARING,
/s/ R. PAUL TJOSSEM,

Attorneys for Intervening Rail-
road Appellants

Acknowledgment of Service attached.

[Endorsed]: Filed October 8, 1956. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause No. 15277.]

DESIGNATION BY APPELLEES OF ADDITIONAL PORTIONS OF RECORD TO BE PRINTED

The Appellees designate for printing the following portions of the record filed in the above captioned court:

1. Those portions of the record before the Interstate Commerce Commission in Docket No. 29974 as certified by the said Commission to the District Court (said record being Exhibit II in the said District Court), as follows:

A. Petition of Defendants for Reconsideration by the Entire Commission and for Argument, filed June 22, 1950.

B. Order of the Commission, entered July 30, 1954, denying Complainants' Request for Oral Argument.

2. Those portions of District Court Exhibit IV, as follows:

A. Those portions of Supplement No. 10 to Transcontinental Freight Bureau Tariff No. 2-P, L. E. Kipp, Agent, I.C.C. No. 1527; said Supplement No. 10 having been filed December 24, 1946, as follows:

(1) All of Page 1 (the title page.)

(2) Introductory paragraph and all of the headings and third item under the headings on Page 2.

B. Those portions of Tariff of Increased Rates and Charges No. X-162, L. E. Kipp, Agent, I.C.C. No. A-3657, said schedule having been filed December 20, 1946, as follows:

(1) All of page 1 (the title page).

(2) The headings (three lines), column headings, and item 107 on Page 24.

(3) The headings (five lines) and the entire first, second and third columns (both A and B) on Page 31.

3. This Designation by Appellees of Additional Portions of Record to Be Printed.

Dated at Seattle, Washington, this 4th day of October, 1956.

/s/ ROBERT O. BERESFORD,

/s/ JO ANN R. LOCKE,

Attorneys for Appellees

Acknowledgment of Service Attached.

[Endorsed]: Filed Oct. 8, 1956. Paul P. O'Brien, Clerk.

United States Court of Appeals

For the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD
COMPANY, UNION PACIFIC RAILROAD COMPANY, SOUTH-
ERN PACIFIC COMPANY, GREAT NORTHERN RAILWAY COM-
PANY, and NORTHERN PACIFIC RAILWAY COMPANY,
Appellants,

vs.

ALOUETTE PEAT PRODUCTS, LTD., *et al.*, *Appellees.*

INTERSTATE COMMERCE COMMISSION, *Appellant,*

vs.

ALOUETTE PEAT PRODUCTS, LTD., *et al.*, *Appellees.*

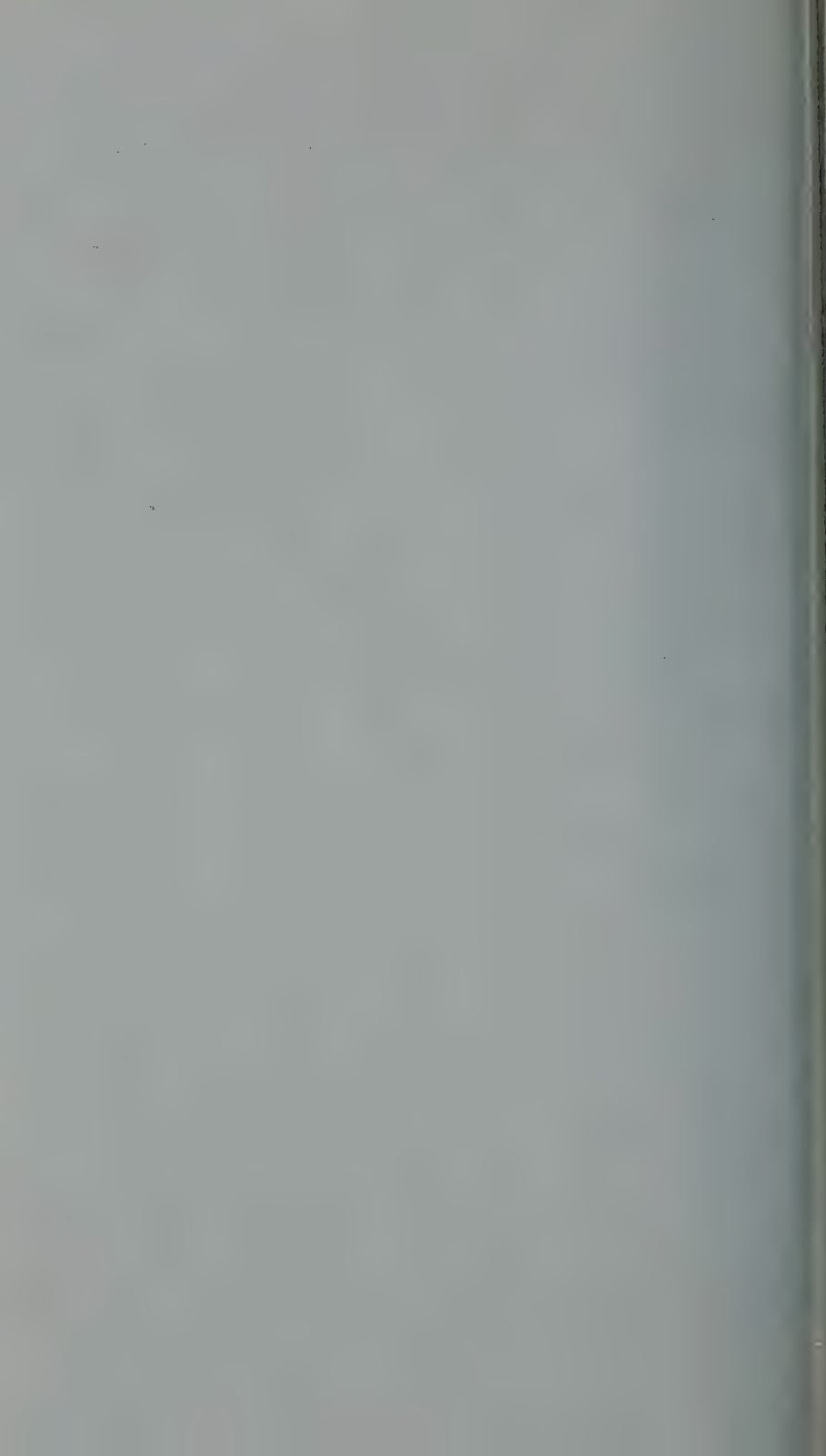
PETITION FOR REHEARING

Before: Hon. William Healy, Hon. James Alger Fee,
Circuit Judges, and Hon. W. D. Murray, Dis-
trict Judge.

B. E. LUTTERMAN
HAROLD G. BOGGS
ROBERT F. GARING
R. PAUL TJOSSEM

Attorneys for Railroad Appellants.

404 Union Street,
Seattle 1, Washington.



United States Court of Appeals

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United States Court of Appeals

For the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL AND
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ION PACIFIC RAILROAD COMPANY,
SOUTHERN PACIFIC COMPANY,
GREAT NORTHERN RAILWAY COM-
PANY, and NORTHERN PACIFIC RAIL-
WAY COMPANY, *Appellants,*

vs.

ALOUETTE PEAT PRODUCTS, LTD., *et al.*,
Appellees.

Nos. 15276-77

INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

ALOUETTE PEAT PRODUCTS, LTD., *et al.*,
Appellees.

PETITION FOR REHEARING

Before: Hon. William Healy, Hon. James Alger Fee,
Circuit Judges, and Hon. W. D. Murray, Dis-
trict Judge.

COME NOW the railroad appellants, and petition the
Court for rehearing in this cause; and in support there-
of state as follows:

SPECIFICATIONS OF ERROR

We respectfully submit that the Court in its opinion
filed in this cause on December 26, 1957, erred in the
following particulars:

1. In concluding on page 13 that the shippers have

paid cash that should not be required of them, and the Commission is required to order its recovery.

2. In concluding on pages 9, 10, 11 and 12 that the rates here considered are unlawful rates, and that the Commission on complaint is *required* to find that they never became effective.

3. In concluding on page 13 that the Commission's determination that the carriers failed to comply with the order of the Commission in *Ex Parte 162* is final and conclusive, and is not reviewable by this Court.

4. In affirming the judgment.

We will argue these errors in the order hereinabove stated.

ARGUMENT

Specification of Error No. 1

The Court erred in concluding on page 13 that the shippers have paid cash that should not be required of them, and the Commission is required to order its recovery.

In footnote No. 4 on page 7, the Court said:

“The Commission having in *Ex Parte 162* determined that the maximum increase that should be allowed in peat freight rates was 6 cents per hundred pounds or \$1.20 per ton, a serious question exists as to the Commission's authority to find in its October 30, 1954, order that the rates were not shown to be unjust or unreasonable, in the light of the decision of the Supreme Court in *Arizona Grocery v. Atchison R. Co.*, 284 U.S. 370, despite the Commission's attempt in *Ex Parte 162* (266 I.C.C. 537 at 617) to remove that order from the doctrine of the *Arizona Grocery* case. How-

ever, the District Court did not consider that question, nor do we.”

Here the Court disclaims any intention of passing on the question which it raised. Yet on pages 12 and 13 the Court raises and decides this very question. There the Court said:

“If the theory of the Commission in this case were to be upheld, a strange situation indeed would exist. Here in *Ex Parte 162*, the Commission found as a matter of fact that the carriers were entitled to a maximum of 6 cents per hundred pounds increase in peat freight rates. Thereafter, for the period between January 1, 1947, and March 29, 1948, the carriers exacted a greater increase than the Commission had found they were entitled to, and the railroads themselves apparently recognized this fact when they voluntarily reduced their rates to reflect the maximum increase of 6 cents. Thereafter, upon further proceedings before the Commission, the Commission reaffirmed its finding that the 6 cents increase was the maximum that should be allowed. Thus under the findings of the Commission, made at two different times, it is established that the 6 cents maximum increase in peat freight rates is all the carriers are entitled to charge; and it is equally established that during the period from January 1, 1947, to March 29, 1948, thousands of dollars were collected from shippers in excess of what would have been collected under the rate the Commission twice determined should be allowed. In short, the shippers here, as in *Southern Pacific v. Darnell-Taenzer Co.*, *supra*, ‘have paid cash out of pocket that should not have been required of them,’ and it would be unthinkable if, as the Commission held, they could not recover it.” (Emphasis supplied)

We note parenthetically that we did not, as the Court infers, reduce these rates because we recognized we had increased them beyond that which the Commission had permitted. We reduced these rates in the normal process of rate-making, and not because we believed these rates were in violation of any order of the Commission (R. 199, 260, 267).¹

Returning to the point in issue, it is apparent from the Court's language on page 12 that the Court concluded that the Commission had twice decided that the maximum the carriers were entitled to charge was the peat rates increased by a maximum of 6 cents per hundred pounds. Hence the statement, "and it would be unthinkable if, as the Commission held, they could not recover it."

If it were true that the Commission had twice decided that peat rates increased by not more than 6 cents per hundred pounds were maximum reasonable rates, and the carriers nevertheless exceeded those rates, we would agree that it would be unthinkable for the Commission not to require us to refund the excess. For in that situation we would have damaged these shippers by charging unreasonable rates.

However, the fact is the Commission in *Ex Parte 162* did not determine that peat rates increased by 6 cents per hundred pounds would constitute maximum reasonable rates, nor did the Commission make such a determination in its first decision in this case.

¹References to the printed Transcript of Record will be shown by the letter "R" followed by the page in the Record at which the material referred to appears.

We first will consider the Commission's order in *Ex Parte 162*, 266 I.C.C. 537.

We start with two fundamental principles:

- (a) The Interstate Commerce Act has not taken from the carriers their power to initiate rates. *Skinner & Eddy Corp. v. U. S.*, 249 U.S. 557, 63 L.ed. 772.
- (b) "A zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself." *U.S. v. Chicago, M. St. P. & R.R. Co.*, 294 U.S. 499 at 506, 79 L.ed. 1923.

The *Ex Parte 162* case was a proceeding in which the carriers, because of drastic and sudden increases in their costs and decline in traffic, sought emergency authority to increase their revenues. It is seen from the report that case involved all of the Class I carriers in the United States, covered the full range of commodities handled by the railroads in the entire United States, and affected many thousands of rates. It involved an increase in freight charges of about 1 billion dollars (page 544).

When the nation's railroads are faced with an emergency need for revenue, they could under the Act simply file tariffs naming the increases they feel are required. *Skinner & Eddy Corp. v. U.S.*, 249 U.S. 557. Unless suspended by the Commission, these increased rates would take effect on 30 days' notice. If this course was followed, the carriers would run the almost certain risk that their publication would be suspended by the Commission under its suspension power granted by Section 15(7) of the Act, Title 49 U.S.C.A. Sec.

15(7). This suspension could last for a period of 7 months, during which time some of the carriers could become bankrupt.

As a practical answer to these emergency situations, there has evolved proceedings which have become known as *Ex Parte* increase cases, of which *Ex Parte 162* is representative. For similar cases see *Ex Parte 115, General Commodity Rate Increases, 1937*, 208 I.C.C. 4, 215 I.C.C. 439, 223 I.C.C. 657; *Ex Parte 148, Increased Rates, 1942*, 248 I.C.C. 545; *Ex Parte 166, Increased Freight Rates, 1947*, 270 I.C.C. 93, 270 I.C.C. 403. The carriers, when faced with an emergency need for revenue, petition the Commission to modify outstanding rate orders so they may increase their rates in stated amounts by publishing and filing tariffs on less than statutory notice. This petition is set down for hearing, and with as much dispatch as is possible considering the number of parties involved, the magnitude of the subject matter, and the territorial scope of the proceedings, the Commission enters an order specifying what per cent of increase will be allowed and what exceptions, if any, should be made in the general percentage increase.

This is what was done in *Ex Parte 162*, and all that was done. The Commission makes no determination that any individual rate when increased by the permitted amount is reasonable. *So far as rate levels are concerned, all the Commission has determined is that if rates are increased to the extent authorized, they will not suspend under Section 15(7).* The only general finding it made on the reasonableness of the increased rates appears in finding 2 on page 614 as follows:

“Except as otherwise specifically provided in these findings or in the appendix thereto, all basic freight rates and charges of the petitioning rail and water carriers justly and reasonably may be increased for the future by 20 per cent.”

This does not constitute a finding that any rate in excess of this amount is unreasonable.

The increased rates are initiated by the carriers, they are not prescribed rates within the meaning of *Arizona Grocery v. Atchison R. Co.*, 284 U.S. 370. Nor did the Commission determine that any individual rate or set of rates were unreasonably low or unreasonably high.

The nature of the *Ex Parte 162* proceedings is made clear by the Commission's quote from an opinion by the late Commissioner Eastman appearing on pages 613 and 614 of the report, where they quote him as saying in an earlier *ex parte* increase case:

“The present proceeding has nothing of finality about it and in many respects is similar to a suspension case, where the question is whether or not certain proposed rates shall be permitted to take effect without suspension, a matter left by the act to the discretion of the Commission.”

Therefore, the Commission in an *ex parte* increase case is not adjudicating the maximum reasonableness of any individual rate or set of rates. The Commission is merely determining that rates filed pursuant to their order are *prima facie* reasonable, and the Commission will not suspend the publication pending investigation as to the reasonableness of the rates.

The rule, of course, works both ways. Carriers can-

not defend against claims for reparation on the grounds that rates filed pursuant to an *ex parte* increase order have been adjudicated as reasonable rates. The Commission's finding that rates may generally be increased by a given percentage does not constitute an adjudication that the resulting rates are reasonable maximum rates or are otherwise lawful.

The Commission has consistently held that the fact they authorized a rate to be increased in a general increase case is no defense when upon investigation it appears the rate is in fact unreasonable. For example, see *William Kelly Milling Co. v. Atchison, T. & S.F. Ry. Co.*, 211 I.C.C. 53 at 56; and *Marshall Field & Co. v. Chesapeake & O. Ry. Co.*, 241 I.C.C. 789 at 792.

All the Commission determined in *Ex Parte 162* was that if the carriers increased their rates on fertilizers by a maximum of 6 cents per hundred, such publication generally would not result in unreasonable rates. They made no finding, and did not purport to make any finding that individual rates or a set of rates on peat or any other commodity, if increased by any amount in excess of the authority there granted, would result in unreasonable rates.

The Commission therefore in *Ex Parte 162* did not find that these peat rates were unreasonable rates.

Nor did the Commission make this finding in their first order in this case. On the question of the reasonableness of the rates we charged, they said (R. 328):

"The evidence introduced by defendants in an attempt to establish the reasonableness of the assailed rates as increased misses the crux of the issue here presented."

In that decision the Commission sought to deprive us of the revenue we had received in excess of 6 cents per hundred pounds increase as punitive damages, based on their finding that we had violated their order. This they cannot do. *Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U.S. 183, 57 L.ed. 1447. In that decision the Commission did not find that we charged unreasonable rates. Instead they based their decision on the theory that the carriers were unjustly enriched (R. 329, 330).

We demonstrated to the Commission that irrespective of the manner in which these rates came into being, the rates fall within the zone of reasonableness. The only adjudication there has been of the reasonableness of these rates is the Commission's last decision in this case (R. 381-386). In that decision, and in only that decision, did they consider the question of reasonableness and the evidence bearing on the reasonableness of the rates. In so doing they found the rates reasonable. The shippers therefore paid nothing more than reasonable rates for the transportation they received.

Certainly there is nothing wrong with carriers receiving a reasonable charge for the service they have rendered. If the carriers here retain all of these charges, they still will have received nothing more than reasonable charges for their service rendered to these shippers.

Specification of Error No. 2

The Court erred in concluding on pages 9, 10, 11 and 12 that the rates here considered are unlawful rates, and that the Commission on

complaint is required to find that they never became effective.

It would appear from the Court's statement on page 3,

“The appellant carriers, subsequent to *Ex Parte 162*, filed with the I.C.C. a special commodity rate on peat shipped from points in British Columbia to destinations in the United States, effective January 1, 1947. . . .”

that the Court may have a misunderstanding of what happened following the decision in *Ex Parte 162*. Peat, generally in the United States, is included in the list of commodities that take rates published for application on fertilizer. Long before 1947—in 1936, 1937 and 1940 on transcontinental traffic (R. 257, 258), and 1937, 1939 and 1940 on California traffic (R. 276, 277), the carriers voluntarily reduced the rates on the peat here considered by removing this commodity from the list of fertilizers and making special lower point-to-point commodity rates applying on peat. We have already pointed out that in so doing, the carriers made rates that were extremely low and which fell near the margin of reasonable minimum rates. In fact, we have shown in our opening brief (pages 23 and 24) that if the carriers had not voluntarily taken this action in the late thirties and early forties and had left peat in the fertilizer group and increased the fertilizer rates by only 6 cents per hundred, these shippers after January 1, 1947, would have paid higher charges than they have been required to pay.

Therefore, when the carriers petitioned the Commission for advance approval of filing tariffs naming per-

centage increases in rates to obtain needed additional revenue in 1946, our tariffs contained these special low commodity rates on peat.

In publishing the increases authorized by the *Ex Parte 162* order, the carriers under special permission published one supplement that carried all of the increases into effect. This was accomplished by providing that all of the rates as then stated in the tariffs for application in Western Territory would be increased by 20 per cent (Ex. 4, R. 407-411), subject to only such exceptions as were noted in the tariff.

The exception on fertilizers is found in Item 107 in the reproduction of the tariff at page 410 of the record. This exception applied 6 cents per hundred maximum on fertilizers, "as and when taking fertilizer rates." This publication limited the increase to 6 cents per hundred pounds on all of our *fertilizer* rates and since peat was not then included in the list of commodities taking such rates, the tariff specified a 20 per cent increase on the lower point-to-point commodity rates on peat.

With this background, we now turn to the legal question: Is the Commission *required* to declare that reasonable, non-discriminatory, non-prejudicial rates are nevertheless unlawful and therefore inapplicable, even though filed with and accepted by the Commission, when it is shown they came into being on less than 30 days' notice and without prior Commission authority for filing on less than 30 days' notice?

This question is not new. It has been before the Com-

mission many times. (See cases cited by the Court on page 8 of the opinion.)

In *Wisconsin Mfrs.' Assn. v. Ahnapee & W. Ry. Co.*, 272 I.C.C. 497 at 500, another case growing out of the carriers' interpretation and application of the order of the Commission in *Ex Parte 162*, the Commission said this:

“One of the duties of defendants is to initiate rates. In publishing rates under permissive or mandatory orders of the Commission, it frequently occurs that the carriers propose other changes in rates not specifically authorized or required by the findings in the particular proceedings. Such rates are subject to protest and suspension if they are considered to be unlawful.”

The contention that rates filed with the Commission should be declared inapplicable, because the tariffs contravene some section of the Act, has been raised many times, and uniformly and consistently these contentions have been denied by both the courts and the Commission.

This contention was raised and denied in *Davis v. Portland Seed Co.*, 264 U.S. 403, 68 L.ed. 762.

Under Section 4(1) of the Act, carriers are prohibited from publishing and filing tariffs which name a lesser rate to a more distant point on the same route as is named for a less distant point, except on application to the Commission and authorization by the Commission. In *Davis v. Portland Seed Co.*, *supra*, at page 415, the Supreme Court said:

“Relying on *Pennsylvania R. R. Co. v. International Coal Co.*, 230 U.S. 184, the Interstate

Commerce Commission has definitely rejected respondent's theory by many opinions, and holds that while a charge prohibited by the long and short haul clause, §4, may subject the carrier to prosecution by the Government it does not afford adequate basis for reparation where there is no other proof of pecuniary damage. . . . ”

What the Supreme Court in that case also said is equally applicable to the situation here:

“With special knowledge of rate schedules, and relying on *Pennsylvania R. R. Co. v. International Coal Co.* (230 U.S. 184) the Interstate Commerce Commission for ten years has required proof of financial loss as a prerequisite to reparation for infractions of the 4th section. The rule is firmly established. Congress has not shown disapproval.”

The Commission, with special knowledge of rate schedules, has held for many years that proof of financial loss is a prerequisite to reparations for infractions of the 6th Section (See cases cited at pages 20-21 of our opening brief). This rule, too, is firmly established, and Congress has not shown disapproval.

Nor does the Supreme Court's decision in *Davis v. Portland Seed Co.*, *supra*, sustain a different conclusion. In commenting on that case in the footnote (5) on page 9, the Court quotes the following language from that decision: “ ‘The statute requires rigid observance of the tariff, without regard to the inherent lawfulness of the rates specified,’ ” and comments that “leaving the inference that if it is inherently unlawful for any reason, it will be corrected upon application to the Commission.”

It should be remembered that the Court made this

statement in a case dealing with a tariff that was unlawfully filed, as it violated Section 4. Yet the Supreme Court sustained the tariff. What the Supreme Court was saying was that the tariff must be applied, and the shippers' remedy is limited to an award of damages if pecuniary damage is shown by the application of rates named in the applicable tariff. Saying it another way: the Supreme Court in that case held that unless the *rate* was unlawful shippers could not claim damage simply because the carriers violated the Act when the rate was established. There, as here, the violation, if any, was the carriers' act in filing the tariff, and damages will not be awarded unless the *rates* are inherently unlawful.

The Court's present opinion will destroy the main purpose for the enactment of Section 6. Section 6 was included in the Act to prevent discrimination in the application of rates to transportation. Section 6 prevents discrimination only by its requirement that the only rates that can be applied to transportation are the rates on file with the Commission. In the furtherance of this congressional policy, and in the interest of absolute certainty as to what rates apply to transportation at any given period, the Commission has consistently followed the rule that there is but one test by which to determine the question of what rates are applicable: If the rates are in tariffs which the Commission has accepted and filed they are applicable.

If the Court is correct in its opinion this will no longer be the case. Under the Court's opinion, rates which are thought to be applicable because they have

been filed with the Commission may be declared inapplicable in a complaint case. Under the rule announced by the Court, unless shippers examine the procedure followed by the carriers in establishing rates they will never know whether the rates on file with the Commission are not subject to being declared inapplicable.

The consequence of the Court's ruling that rates must be declared inapplicable if on complaint it appears they were filed in contravention of Section 6 is no different than if the Court had ruled that rates filed in contravention of Section 6 never became applicable. In either case the result is the same: the rates were never applicable.

The rule adopted by the Commission is authorized by Section 6. The requirement that rates named in tariffs cannot be changed except on 30 days' notice is directed to the carriers and not the Commission. The Commission, in the same section that requires 30 days' notice, Section 6(3), was given the following discretion:

“ . . . the Commission may in its discretion and for good cause shown, allow charges upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances.”

Under this provision the Commission may disregard the 30 days' notice provision and accept tariffs that give less notice. Certainly the language of this provision is broad enough to empower the Commission in its discretion to adopt the rule that where it accepts tariffs and files them, the rates therein named are applicable and

the charges assessed under such rates are subject to challenge only as being unlawful under Sections 1, 2 and 3 of the Act.

The Commission's interpretation of its power under Section 6 is also consistent with that section when considered as a whole.

The discretionary power of the Commission under Section 6(3) should be considered in light of the provisions of Sections 6(6)² and 6(9). In both sections the Commission is authorized to reject and refuse to file any schedule (tariff) that is tendered not in accordance with Section 6, and then provides that it is only when such tariff is rejected that it shall be void and its use shall be unlawful.

Moreover, Section 6(9) does not *require* the Commission *to reject* a tariff that is filed which does not give *lawful* notice of its effective date. The section provides that the Commission "may" reject and refuse to file such tariff, and it is only when it is rejected that such tariff is void and its use is unlawful. Here the Commission accepted the tariff and it was filed. Had Congress intended that the Commission, as the Court now holds, is *required* to reject a tariff which does not give *lawful* notice of its effective date, it would have so stated in Section 6(9).

²The publishers of U.S.C.A. did not include the 1940 Amendment to Section 6(6). As amended in 1940 it reads as follows:

"The schedules required by this section to be filed shall be published, filed, and posted in such form and manner as the Commission by regulation shall prescribe; and the Commission is authorized to reject any schedule filed with it which is not in accordance with this section and with such regulations. Any schedule so rejected by the Commission shall be void and its use shall be unlawful." Act of September 18, 1940, Chap. 722, § 8, 54 Stat. 910.

Therefore, Congress in Section 6 not only gave the Commission broad power to determine under what circumstances tariffs should become applicable, but Congress itself in Sections 6(6) and 6(9) has laid down the same rule that has been followed by the Commission.

We submit that the Supreme Court's decision in *Boston & Maine Railroad v. Piper*, 246 U.S. 439, is not in point. That case simply holds that carriers may not limit their common law liability by so providing in their tariffs filed with the Commission. It does not consider the question here presented. As we have pointed out, the question here considered was decided by the Supreme Court in *Davis v. Portland Seed Co.*, *supra*, and although the *Davis* case was decided after *Boston & Maine Railroad v. Piper*, the Supreme Court did not find it necessary to discuss, distinguish, or overrule that decision.

Furthermore, the language of Section 6 should be contrasted to the present language of Section 20(11). As to limiting liability, Section 20(11) now provides that carriers are prohibited from limiting their liability, except in a few instances expressly mentioned, in any receipt, bill of lading, "... or in any tariff filed with the Commission ... and any such limitation ... is hereby declared to be unlawful and void."

In Section 20(11), Congress expressly provided that such tariff provisions are void. In Sections 6(6) and 6(9) Congress provided that tariffs tendered to the Commission that contravene the requirements of Section 6 would be void only when rejected by the Commission.

When Section 16(3)(g) is read in light of Section 6(6) and Section 6(9), we think it is apparent that what Congress intended by the phrase, "... lawfully on file with the Commission" in Section 16(3)(g) was rates named in tariffs accepted by and filed with the Commission. Had Congress intended that rates accepted and filed with the Commission could be declared illegal and void, and therefore unlawful rates, as used in Section 16, they would not have given the Commission discretionary authority to accept or reject tariffs in Sections 6(6) and 6(9), but would have provided in language similar to their language in Section 20(11) that tariffs filed in violation of Section 6 shall be unlawful and void.

The present rule of the Commission that rates that are named in the tariffs on file with the Commission are the applicable rates avoids many problems which will inevitably arise if the Court's present opinion is permitted to stand.

Under the present rule of the Commission, if any one is damaged by any rate they have a remedy under Sections 1, 2 or 3 of the Act. The public and the carriers know with absolute certainty what rates are applicable. The test of applicability is simple: the rates are either accepted or rejected by the Commission. In the first instance they are applicable; in the second they are not. The certainty in establishing one rate and one rate only for any given transportation, which was the only purpose of Congress in adopting Section 6, has been achieved. Not only do shippers know what rates they must pay; they know what rates their competition must pay.

Much of this certainty will be destroyed if the Court's present opinion is permitted to stand. We assume that if the carriers had not voluntarily reduced these rates to the basis of 6 cents per hundred, under the Court's opinion they would still be subject to attack in 1958—eleven years after they were published. Many schedules remain in effect for long periods of time. If the Court is correct that rates which do not strictly measure up to the requirements of Section 6 are susceptible to attack and on complaint they are required to be found inapplicable, the carriers may be subjected to grave unanticipated financial losses of revenue.

It will be open to any shipper to examine each publication of the carriers which was made on less than statutory notice—and there are many; and if they find a basis for contending the carriers misinterpreted the order of the Commission, or for other reasons did not strictly comply with Section 6, they may recover reparations for the full statutory period of two years. Such recoveries will be possible irrespective of whether the shippers were charged reasonable rates. For under the Court's theory the issue would be one of overcharges and not damages.

In addition, when we reduce rates on less than the 30-day notice required by Section 6, and this is constantly occurring, shippers will use these rates at their peril. Shippers using such reduced rates and relying on them to make competitive sales in markets against competition from producers in other regions, may be faced with the prospect of having their competitors

force the Commission to declare their reduced rates were inapplicable. If this occurs the carriers would have no alternative but to collect the higher charges. This will occur even though these shippers in good faith relied on rates which are named in the carriers' tariffs which were available to them, and which were filed with the Commission.

In the short time we have had to consider the Court's opinion we have not been able to foresee all of the consequences that would follow from the rule the Court adopted. In the foregoing paragraphs we have merely attempted to illustrate some of the situations that will result. We are certain, however, that under this rule there will be many instances where shippers and carriers will not know what rate is applicable until there is an adjudication by the Commission or the courts.

Nor does it follow from the Court's opinion that the judgment should be affirmed. The judgment requires reparation for the entire period from the time the increased rates took effect on January 1, 1947, until they were all finally voluntarily changed, the last reduction being on March 29, 1948.

The most that happened here was that rates were put into effect on 5 days' notice rather than 30 days' notice. The appellees have never questioned the fact that the rates were published, or filed. Their complaint is simply that the rates were published and filed on less than 30 days' notice. This short notice had only one effect on these shippers: they were required to pay the increase

in rates 25 days sooner than they would have if the full 30 days' notice had been given.³

Since the rates were published and filed, after the lapse of 30 days there was no longer any defect in the publication, filing, or notice. Even under the Court's theory, the most these shippers are entitled to is reparations on shipments that moved during the 25-day period between the date the rates became effective and the 30-day notice period the Court now holds was required.

Specification of Error No. 3

The Court erred in concluding on page 13 that the Commission's determination that the carriers failed to comply with the order of the Commission in *Ex Parte 162* is final and conclusive, and is not reviewable by this court.

In our foregoing discussion we have assumed that the Commission's conclusion that we failed to comply with *Ex Parte 162* order was correct and that this conclusion is binding on this Court. However, we believe we fairly interpreted the Commission's order in *Ex Parte 162*, and the Commission's conclusion on this issue is reviewable by this Court.

The question of whether the carriers complied with the order in *Ex Parte 162* is a question of law. There is and has been no dispute as to any fact. The appellees contend and we admit that in filing the increases fol-

³ Actually the rates were published on 10 days' notice, as the tariff was issued on December 21, 1946. See Ex. 4, R. 407.

Had the rates been published on 30 days' notice the shippers could have protested the rates and asked for suspension under Section 15(7). However, since the Commission found the rates were reasonable it would appear extremely unlikely that the Commission would have suspended.

lowing the Commission's decision in *Ex Parte 162*, we increased the peat rates by 20 per cent. There is but one question involved: Under a fair interpretation of the Commission's order in *Ex Parte 162*, did the Commission authorize this action?

After the decision in *Ex Parte 162* there were many difficult questions that had to be resolved when the tariffs were prepared for publication. One of these problems was the question here presented: Did the Commission authorize a 20 per cent increase on peat when rates were published on peat, or did they intend to limit the increase to 6 cents per hundred on any commodity listed in the fertilizer group for statistical purposes?

To start with, the Commission had authorized a general increase of 20 per cent—except as set forth in the Appendix (266 I.C.C. 537, finding 2, page 614). The Commission had said very little about fertilizers in their report. What they did say appears on page 595 as follows:

“The rail movement of fertilizer increased from about 9.5 million tons in 1940 to about 19 million tons in 1945, and the revenue from \$27,000,000 in 1940 to \$69,000,000 in 1945, with an average rate of about \$3.60 per ton. Its average value is only about 21 per cent higher than in 1910-14, and about 13 per cent lower than in 1926. Petitioners propose a rate increase thereon of 25 per cent without limitation.

“Use of fertilizer increases the fertility of the soil, and increases both the production and shipment of agricultural products in the interest of farmers, carriers, and the public generally. An in-

crease in the rates on fertilizer of 25 per cent will be too great for the longer hauls, unless a maximum is prescribed."

Peat does not increase the fertility of the soil (R. 159). Moreover, and more important, the Commission in the Appendix had stated we were generally to apply the increases in accordance with the grouping of commodities for statistical purposes (Appendix 1, page 618). We concluded that it was intended that commodities moving as fertilizer should be held to a 6-cent maximum increase, and that when commodities had been removed from this grouping for rate purposes they should take a 20 per cent increase.

The Commission in its first decision in this case did not hold that we failed to follow their general intention. They found that they intended to permit no deviations from the statistical listing of commodities as set forth in the Appendix (R. 326-327).

For the reasons set forth in our opening brief (pages 11-14) we believe it cannot be said, as a matter of law, that under a fair interpretation of the Commission's order there could be no deviation from the statistical grouping set forth in the Appendix. Had the Commission intended there could be no deviation from the statistical listing of commodities they could have made this clear by not including the last sentence in the opening paragraph of the Appendix where they said the increases were intended *generally* to apply to the commodities as listed.

We generally applied the increases to the commodities as listed in the statistical grouping. This was all

that was required of us. The increase in rates was authorized.

CONCLUSION

We earnestly request the Court to rehear this case and on rehearing to reverse the judgment of the trial court.

Respectfully submitted,

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Seattle 1, Washington.

R. Paul Tjossem hereby certifies that he has prepared the foregoing petition for rehearing and that in his judgment it is well founded and is not interposed for delay.

Dated this 24th day of January, 1958.

R. PAUL TJOSSEM

Of Counsel for Appellant Railroads.

**In the United States Court of Appeals
for the Ninth Circuit**

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAIL-
ROAD COMPANY, UNION PACIFIC RAILROAD COMPANY,
SOUTHERN PACIFIC COMPANY, GREAT NORTHERN
RAILWAY COMPANY AND NORTHERN PACIFIC RAIL-
WAY COMPANY, APPELLANTS

v.

ALOUETTE PEAT PRODUCTS, LTD., ET AL., APPELLEES

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

ALOUETTE PEAT PRODUCTS, LTD., ET AL., APPELLEES

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

PETITION FOR REHEARING

ROBERT W. GINNANE,
General Counsel,

C. H. JOHNS,
*Associate General Counsel,
Interstate Commerce Commission,*

Washington 25, D. C.

JANUARY 25, 1958

FILED

JAN 28 1958

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In the United States Court of Appeals for the Ninth Circuit

Nos. 15276-77

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAIL-
ROAD COMPANY, UNION PACIFIC RAILROAD COMPANY,
SOUTHERN PACIFIC COMPANY, GREAT NORTHERN
RAILWAY COMPANY AND NORTHERN PACIFIC RAIL-
WAY COMPANY, APPELLANTS

v.

ALOUETTE PEAT PRODUCTS, LTD., ET AL., APPELLEES

INTERSTATE COMMERCE COMMISSION, APPELLANT

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ALOUETTE PEAT PRODUCTS, LTD., ET AL., APPELLEES

*APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION*

PETITION FOR REHEARING

Pursuant to Rule 23 of the Court, the Interstate Commerce Commission petitions for a rehearing of these appeals for the reason that the court has failed to consider paragraphs (6) and (9) of Section 6 which, we believe, govern the disposition of this matter.

In its opinion, the court upholds the Commission's conclusion that the shippers have not suffered dam-

ages within the purview of the Interstate Commerce Act by the payment of the higher charges. And the court also agrees with the Commission's conclusion that the higher rates made effective on less than 30 days' notice were the ones which the railroads were required to collect and the shippers to pay—that is, such rates were the applicable (legal) rates.

Since the shippers have not suffered any damage within the purview of the Interstate Commerce Act and have paid only the applicable (legal) rate, it would seem that they would be unable to recover any of the charges from the railroads. Such has been the law until now. But the court reasons that since the carriers violated Section 6 (3) by making the 20 percent increases effective on less than 30 days' notice, the increases were not lawfully established, so the shippers can recover the increases as overcharges.¹

In reaching its decision in this matter, the court relied on paragraph (3) of Section 6 and did not comment on other paragraphs of Section 6 which, in our opinion, compel the conclusion that the long-standing interpretation by the Commission, which handles literally thousands of tariff changes annually,²

¹ Even under this view it would seem that the increases would be lawful 30 days after they were filed.

² In its 70th (1956) Annual Report to the Congress the Commission reported at pages 57-58:

During the year, 175,117 publications containing newly established or changed freight, express, pipe-line, or freight-forwarder rates, passenger fares or contract-carrier minimum rates, were received for filing.

* * * * *

Of those tariff and minimum-rate schedules, 2,275 were rejected by the Bureau of Rates, Tariffs, and Informal

is sound. Thus, Section 6, paragraphs (6) and (9) grant authority to the Commission to reject a schedule submitted to it which does not comply with the provisions of Section 6 and provide that a schedule so rejected shall be void and its use unlawful. Section 6 (9) provides specifically that the Commission "*may* reject and refuse to file any schedule which does not provide and give lawful notice of its effective date and any schedule so rejected by the Commission shall be void and its use shall be *unlawful*." The obvious purpose of this provision is to provide with certainty that if the Commission fails to reject such schedule the rates shown therein become the legal rates and their use lawful. It follows that a suit for over-

Cases for failure to give notice required by the statute or for nonconformity with regulations, and 8,954 were criticized but were accepted for filing. Filings of powers of attorney, certificates of concurrence, and revocation notices aggregated 15,594. Applications requesting permission to change rates or other tariff provisions on less than statutory notice, or to depart from our publishing rules, numbered 11,613, and 86 were pending November 1, 1955, for a total of 11,699 applications. Of these, 10,225 were approved, 1,389 were denied, and 85 are pending. * * *

* * * * *

A total of 3,398 rate adjustments involving changes in tariffs and schedules of rail, motor, water, freight-forwarder, and express carriers were disposed of by the Board of Suspension, division 2, or the Commission. Substantially all of the adjustments had been protested. Of the total of 3,398, 173 represented increases, 3,111 reductions, 87 both increases and reductions, and 27 neither increases nor reductions. There were 5,672 tariff publications involved in these rate adjustments.

charges cannot be predicated upon a tariff which the Commission fails to reject.³

Similarly, Section 6 (6) provides that schedules *shall* be published, filed and posted in such form and manner as the Commission by regulations *shall* prescribe, that the Commission *may* reject a schedule not in accordance with Section 6 or its regulations and that any schedule rejected shall be void and its use *unlawful*. Again it seems plain that unless the Commission rejects the schedule it becomes a lawful one. Surely no one would contend that rates contained in a schedule in the files of the Commission may be the basis of a suit for overcharges because the schedule violates some provision of the Commission's tariff circular containing the prescribed rules. But under the rationale of the court's rule such a schedule is subject to attack on that ground.

The business of rendering transportation for the public today is highly competitive. In many cases changes in schedules are made to reduce rates to a minimum in order to meet other carrier competition. It often happens that after hearing on such a reduced rate which is already in effect, the Commission will find the rate unreasonably low but suggests that an intermediate rate will be reasonable. Compare *National Water Carriers Assn. v. United States*, 120 F. Supp. 719. The lower rate in effect is ordered can-

³ This construction is in harmony with the definition of overcharge in Section 16 (3) because such a tariff is *lawfully* on file with the Commission. Had an attempt been made to collect a charge "in excess of those *applicable*", then, of course, a suit for overcharges would lie. But here, the court has expressly found that the higher charges were "applicable".

celed. The carrier files its new tariff canceling the unlawful rate and publishing the suggested rate. Under the court's rule if only 29 days' notice were given and the Commission failed to detect the error, the shipper two years later could recover as overcharges the addition to its freight bills during that period even though the prior rate had been found to be unlawful because unreasonably low. We do not believe that Section 6 (3) should be construed to permit such a recovery and we submit that Section 6 (9) prevents it.

Beginning as early as 1915, and continuing down to date, in every formal matter presented to it in which the question has arisen, the Commission has consistently interpreted Section 6 of the Act to mean that a rate published in a tariff and accepted for filing becomes, on its effective date, the legal (applicable) rate, even though it violates some provision of the Interstate Commerce Act or some order issued by the Commission, and that no part of the charges collected under this rate may be returned to the shipper except upon a showing (1) that the rate violates some other section of the Act, and (2) that the shipper was damaged through such payment. The rationale for this "strict" rule on tariff applicability, the distinction between the legal rate under Section 6 and the lawful rate under other sections of the Act, and the fact that the Act distinguishes between overcharges (of the legal rate) and damages (for violation of some other section of the Act) are set forth in the following quotations from three decisions of the Supreme Court:

Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.* * *. [*Louis. & Nash. R. R. v. Maxwell*, 237 U. S. at 97]

* * * In order to render rates definite and certain, and to prevent discrimination and other abuses, the statute required the filing and publishing of tariffs specifying the rates adopted by the carrier, and made these the *legal* rates, that is, those which must be charged to all shippers alike. Any deviation from the published rate was declared a criminal offense, and also a civil wrong giving rise to an action for damages by the injured shipper. Although the Act thus created a legal rate, it did not abrogate, but expressly affirmed, the common-law duty to charge no more than a reasonable rate, and left upon the carrier the burden of conforming its charges to that standard. In other words, the legal rate was not made by the statute a lawful rate—it was lawful only if it was reasonable. Under § 6 the shipper was bound to pay the legal rate; but if he could show that it was unreasonable he might recover reparation. [*Ari-*

zona Grocery v. Atchison Ry., 284 U. S., at 385]

* * * But the English courts make a clear distinction between overcharge and damages, and the same is true under the Commerce Act. For if the plaintiff here has been required to pay more than the tariff rate it could have recovered the excess, not as damages, but as overcharge, and while one count of the complaint asserted a claim of this nature, the proof did not justify a verdict thereon, for the plaintiff admitted that it had only paid the lawful rates named in the tariff. Of course, no part of such payment of lawful rates can be treated as an overcharge or as an extortion. [*Davis v. Portland Seed Co.*, 264 U. S., at 420]

While the terms legal and lawful rates, and damages and overcharges have not always been employed with care, we submit that these Supreme Court decisions do draw a careful line of distinction; overcharges arise where an inapplicable rate or wrong tariff is applied, but as long as the applicable tariff is applied, the remedy of the shipper is by way of damages, if he can establish that the applicable tariff resulted in damage.

In sum, a rate is either applicable (legal) or it is not applicable (legal). If it is applicable (legal) a suit for overcharges or undercharges will not lie. If the applicable (legal) rate is *unlawful*, i. e., unreasonable or discriminatory, a shipper may sue for his *damages*. Failing to recognize this distinction, this court rules that although the shippers have proved no *damage* they may nevertheless recover part of the

charges paid because of the carrier's unlawful act in making effective the increased rates on less than 30 days' notice. The rule is contrary to *Davis v. Portland Seed Co.*, 264 U. S. 403, as well as the Commission's long-standing interpretation. To paraphrase the language of the Court in the *International Coal Co. case*, 230 U. S. 184, 200, this Court would allow the shippers to recover what, though called overcharges, would really be a penalty assessed against the carriers for their violation of the law⁴ in putting the rates into effect on less than 30 days' notice.

CONCLUSION

We urge this Court not to overturn 40 years of consistent administrative interpretation of the tariff filing provisions of the Interstate Commerce Act without taking into consideration Sections 6 (6) and (9) of the Act and the distinction between damages

⁴ The Court's reliance upon the *Piper* case is misplaced. That case dealt with a tariff provision void on its face. It is similar to the situation where the carrier publishes a rebate in its tariff. The rebate is void—cannot become legally effective—and the carrier may be prosecuted for paying the rebate. *Central R. Co. of N. J. v. United States*, 229 Fed. 501. Compare *Chicago & A. Ry. Co. v. United States*, 156 Fed. 558, affirmed 212 U. S. 563. Here the Court agrees that the rates became effective but would grant the shippers a refund because 30 days' notice was not given.

and overcharges as expressed by the Supreme Court in the *Portland Seed Co.* case, *supra*.

Respectfully submitted.

ROBERT W. GINNANE,
General Counsel,

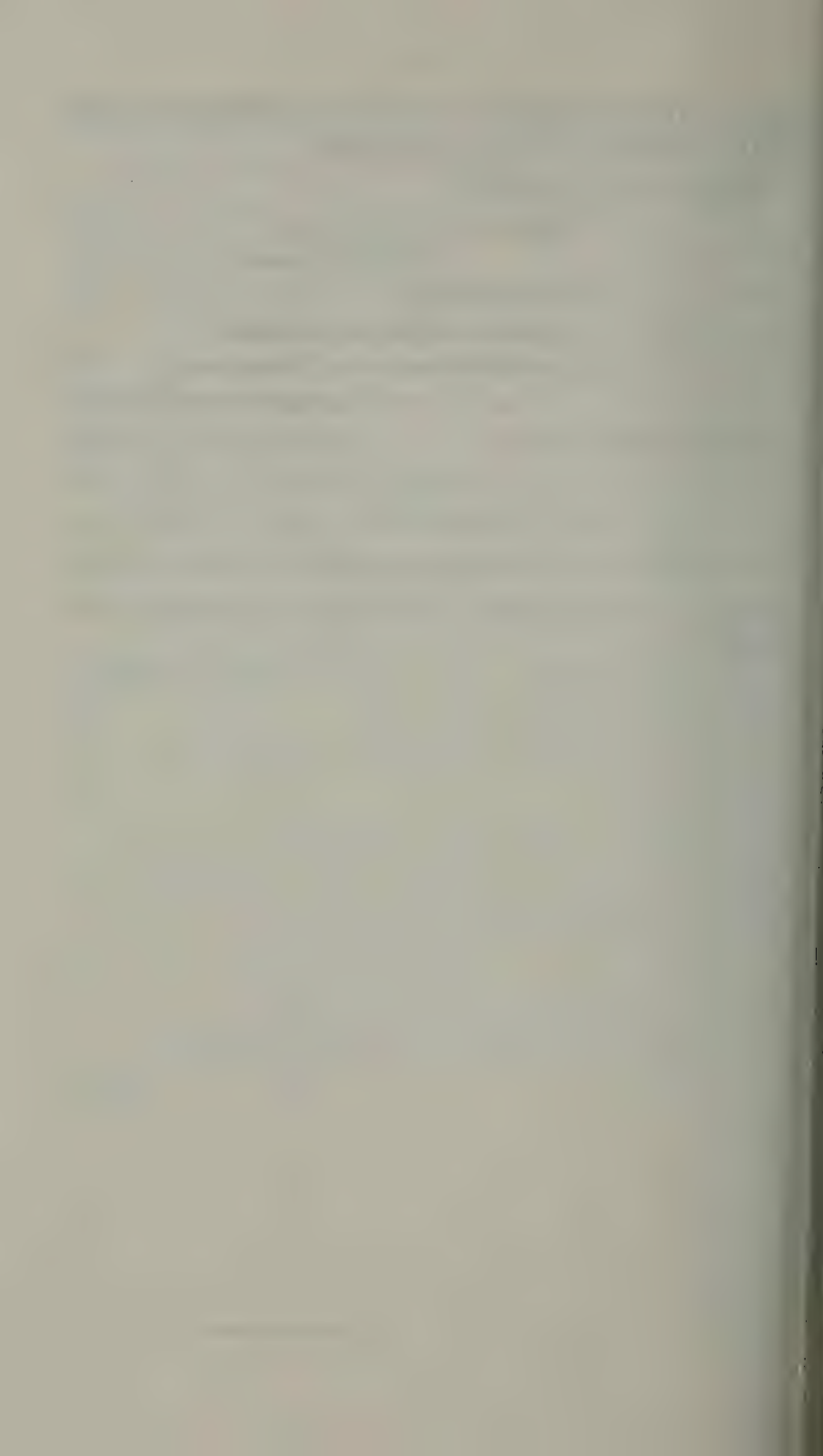
C. H. JOHNS,
Associate General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

JANUARY 25, 1958.

CERTIFICATE

I certify that in my judgment this Petition for Re-hearing is well founded and is not interposed for delay.

C. H. JOHNS.



United States Court of Appeals
For the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL and PACIFIC RAILROAD
COMPANY, UNION PACIFIC RAILROAD COMPANY, SOUTH-
ERN PACIFIC COMPANY, GREAT NORTHERN RAILWAY
COMPANY and NORTHERN PACIFIC RAILWAY COMPANY,
Appellants,

vs.

ALOUETTE PEAT PRODUCTS, LTD., *et al.*, *Appellees.*

INTERSTATE COMMERCE COMMISSION, *Appellant,*

vs.

ALOUETTE PEAT PRODUCTS, LTD., *et al.*, *Appellees.*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

REPLY OF RAILROAD APPELLANTS TO BRIEF OF
APPELLEES

FILED

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United States Court of Appeals

For the Ninth Circuit

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United States Court of Appeals
For the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL and PACIFIC RAILROAD
COMPANY, UNION PACIFIC RAILROAD COMPANY, SOUTH-
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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

**REPLY OF RAILROAD APPELLANTS TO BRIEF OF
APPELLEES**

We will reply to the arguments of the appellees in
the order stated in their brief:

I.

The appellees first argue that the Interstate Commerce Commission (hereinafter called "Commission") violated its own rules when it granted the railroads' second petition for reconsideration. The basis for the appellees' contention that the Commission violated its own rules in granting the second petition for reconsideration is that all that the Commission did in deciding *F. W. Bolgiano & Co., Inc. v. Baltimore & O. R. Co.*,

291 I.C.C. 659, was to reach a result contrary to the result first reached in the instant case (appellees' brief pg. 9), and the decision in the *Bolghiano* case merely constitutes a "change of heart," or "some quirk or change in administrative policy," by the Commission (appellees' brief pg. 11).

The second decision in the *Bolghiano* case constituted much more than a change of heart or mere quirk or change in administrative policy by the Commission. As we pointed out by the cases cited on pages 20 and 21 of our opening brief, the Commission as early as 1913, in *Brown & Sons Lumber Co. v. L. & N. R.R. Co.*, 37 I.C.C. 507, and down through the years until the first decision in the instant proceeding, uniformly and consistently adhered to the principle of law that where carriers tender tariffs which are accepted and filed with the Commission, the rates named therein become effective according to the terms of the tariff, even though the tariff should have been rejected on tender because the carriers in tendering the tariff violated some outstanding order of the Commission; and that shippers were not entitled to damages by reason of such violation in the absence of proof that they were damaged thereby.

In the initial decision in the instant proceeding, the Commission for the first time held that when tariffs are filed that violate some requirement of the Commission, shippers not damaged by such violation may recover damages on the theory of unjust enrichment. It was and is our opinion that the Commission in so deciding was wrong. We therefore determined to test the validity of this decision by requiring the shippers to sue

under 49 U.S.C.A. Sec. 16(2) to enforce the order requiring the payment of reparations. However, prior to the time a suit was instituted to enforce the order, the Commission, on reconsideration in the *Bolgiano* case, rejected the doctrine that it could award damages on the theory of unjust enrichment, and again adhered to the theretofore long-established doctrine that in the absence of proof of damage, shippers were not entitled to recover damages.

Since the Commission had retreated from its incorrect decision when it decided the *Bolgiano* case on reconsideration, we concluded we should give the Commission an opportunity to correct the same error in the instant proceeding. We did this by filing our petition for leave to file a second petition for reconsideration. The rejection by the Commission of the erroneous doctrine of unjust enrichment and its re-adherence to long-established legal principles in the second decision in the *Bolgiano case*, certainly constituted changed circumstances and new grounds for reconsideration. Good cause was shown for leave for the rail carriers to file their second petition for reconsideration. Since good cause was shown, and the second petition was based on new grounds and a substantial change in circumstances, the Commission, in granting leave to file the second petition for reconsideration, complied with its own rules.

II.

In Part II of their argument, the appellees contend that the railroads in our opening brief have asserted that under the Commission's order in *Ex parte 162*, the rail

carriers "... had authority to vary the statistical commodity listings as they saw fit" (appellees' brief, pg. 12). At the bottom of page 12, they state, "The Commission never had the slightest intention that the individual carriers could vary the commodities commonly reported under these group numbers and place such commodities under other classifications, thus subjecting them to different freight rates."

The appellees have misconstrued our argument. We did not and do not contend that the Commission in its Ex parte 162 order permitted the carriers to vary the statistical commodity listings as we saw fit. Our contention, as set forth on pages 11 to 14 of our opening brief, is that the Commission, under a fair interpretation of the language it used in prescribing the manner of applying the increases authorized by its order in Ex parte 162, intended that the increases generally should apply to commodities as listed in the statistical grouping; that where there was a reasonable basis for deviations from a strict adherence to the commodity statistical grouping, the Commission intended that such deviations should and would be made; that under the circumstances here presented, good grounds existed for a deviation from a strict adherence to the commodity statistical grouping, and therefore the application of a 20 per cent increase to these peat rates was permissible under the Commission's order.

III.

Under Part III of their argument, the appellees argue that the tariffs which named the rates the shippers paid, were never published. On page 15 they say,

"In short, there is no publication of any kind here, and the rates are, therefore, null and void." They do not directly challenge the findings of the Commission in the initial decision (T. 324), and in the second decision (T. 342), that the carriers published and filed tariffs with the Commission effective January 1st, 1947, increasing their tariff charges by 20 per cent. The record, of course, is clear that the rail carriers did publish and file tariffs increasing their charges by 20 per cent, effective January 1st, 1947 (T. 258-259); and the fact that the carriers published tariffs naming these increases effective January 1st, 1947, was admitted by the shippers' counsel when he appeared as a witness at the hearing (T. 214). The Examiner asked this same witness the following question (T. 198):

"EXAM. HALL: Well, now, let me ask you, on January 1, 1947, this 20% increase, was that a temporary increase or was it a permanent increase?"

"THE WITNESS: It was a nation-wide, permanent increase. It was incorporated in the rate structure at that time; it was not temporary."

There is no question on this record that the rail carriers published and filed tariffs effective on 5 days' notice naming a 20 per cent increase in the rates here considered, and that these rates became effective on January 1st, 1947. The Commission, in both the initial decision and the second decision in this case, has held that these tariffs, since they were on file with the Commission, named the only applicable rates. We think it is clear from a reading of Section 6 of the Interstate Commerce Act (Title 49 U.S.C.A. Sec. 6) that the Com-

mission was correct in its holding that where it accepts and files tariffs, the rates named therein become the only applicable rates. Sub (9) of that section provides as follows:

“The Commission may reject and refuse to file any schedule that is tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Commission shall be void and its use shall be unlawful.”

It is evident from this section that it is only where a tariff is *rejected* by the Commission that it becomes void and of no effect. On the other hand, there is no rule relating to transportation that is more firmly settled than the rule that there can be no deviations by carriers from their tariffs that are *filed* with the Commission.

The appellees argue (appellees' brief, pg. 14):

“The purpose of the statute (49 USCA Sec. 6, sub (3)) is, of course, to give notice to the public and to allow them to protest and suspend rates prior to their taking effect.”

This statement is completely unsupported by any authority. The fact is, the requirement that tariffs should be filed with advance notice was contained in the original Interstate Commerce Act, in Section 6 of the Act to Regulate Commerce of February 4, 1887, 24 Stat. at L. 381. This requirement was in the Act long prior to the time the Commission had any power to suspend rates. The Commission's power to suspend a rate was first granted by Congress in the Mann-Elkins Act of June 18, 1910 (36 Stat. at L. 552, Sec. 12). The original Act as enacted in 1887 (24 Stat. at L. 381, Sec. 6) pro-

vided that no increase could be made in rates except after 10 days' public notice. This Act was amended in 1889 (25 Stat. at L. 856, Sec. 1), and then required the same 10 days' notice for an increase in rates and 3 days' notice for a decrease in rates. The 30-day notice requirement of any change in rate came into the Act by the Hepburn Act of June 29, 1906 (34 Stat. at L. 586, Sec. 2). Consequently, the 30-day notice requirement was in the Act for four years prior to the time the Commission had any power to suspend rates. As we have pointed out in our opening brief, the provision for public notice is to prevent discrimination and secret changes in rates, and it was not inserted for the purpose here contended for by the appellees, *i.e.*, to give shippers an opportunity to seek suspension.

If it be assumed that the carriers in publishing these rates on 5 days' notice violated the order of the Commission in *Ex parte* 162, and these shippers were thereby deprived of an opportunity to ask for suspension of the rates, this fact in no way damaged these appellees. Under Section 6 of the Act, shippers are entitled to have carrier rates published and on file with the Commission. This was done. Under Section 1 the shippers are entitled to reasonable rates. The rates, when increased by 20 per cent, were well below maximum reasonable rates. Hence this section was complied with. Under Sections 2 and 3, the shipper is entitled to a non-discriminatory and non-prejudicial rate. We have already in our opening brief demonstrated that the rates here assailed were not discriminatory nor prejudicial. What these appellees complain of is not that any act of the railroads did them damage, but that

the railroads in filing these rates violated an order of the Commission. If we did violate the order of the Commission, the railroads must answer to the Commission for this violation, and shippers cannot recover for this violation unless they were damaged.

These shippers stand in no different position than any other shipper under the Interstate Commerce Act. Irrespective of the manner in which rates come into being, when they are filed with the Commission, they become the applicable rates. When tariffs are filed with the Commission, and by their terms become effective, the tariffs then name the applicable rates. The shippers here, like any other shipper, have the full right under Title 49 U.S.C.A. Sec. 13, to file a complaint against existing rates, and if they are damaged by such existing rates, the Commission is authorized to award them monetary damages. These shippers have pursued that remedy. The fact that they were not entitled to ask for a suspension of these rates has deprived them of nothing; for if these rates in fact damaged them, they stand to recover those damages under Section 13, the same as any other shipper. The Commission denied the appellees' complaint because they did not, and could not show they were damaged.

The only authority appellees cite in support of their position that the rates assessed were inapplicable is *Illinois Central R. Co. v. Van Duesen-Harrington Co.*, 170 Minn. 488, 212 N.W. 940. The court's holding in that case was based on a misreading of the Supreme Court's decision in *Davis v. Portland Seed Co.*, 264 U.S. 403, 68 L.ed. 762.

IV.

Under Part IV of their brief, appellees argue that the weight of the evidence shows the rates to be unreasonable. The only evidence to which they refer is that the prior rates were voluntarily established, and had been in effect for some years (appellees' brief, pg. 21), and they then argue that this raises a presumption that these rates were reasonable.

The only other evidence mentioned by the appellees as supporting their contention is that peat does not require any special equipment, and that claims are not made on peat shipments. The contention that peat shippers do not file claims is based on the statement of one witness as to the experience of his company only, and did not purport to cover all shippers (appellees' brief, pg. 23; and T. 241).

The foregoing is appellees' summary of the evidence the appellees assert constitutes the overwhelming weight of the evidence that demonstrates the rates are unreasonable (appellees' brief, pg. 24). On the other hand, appellees admit the revenue from the rates was low (appellees' brief, pg. 23).

The facts that rates have been in effect for some time, that the carriers voluntarily decreased the rates after having increased them, and these shipments present no unusual cost features such as the need for special equipment, or large and numerous claims for damage, do not constitute evidence that the rates are unreasonable. The Commission's finding that there is no evidence that can be said to afford a sound basis for a finding of unreasonableness (T. 386) is fully supported by the record.

The appellees admit there is evidence that the rates are reasonable (the low revenues from the rates), and the most that they can argue is that there is some other evidence that bears on the reasonableness of the rates. In this circumstance, the question as to whether this other evidence should be considered, or is persuasive, is for the Commission and not this court. The Commission has done its duty when it found on the evidence that the assailed rates were reasonable. This finding must be accepted by the court. *Interstate Com. Com. v. Union P. R. Co.*, 222 U.S. 541, 56 L.ed. 308.

These appellees, and the trial court (Finding of Fact VII), assume that there is an obligation on the part of the carriers to guarantee that these shippers can profitably reach markets 3,000 to 3,500 miles away from their points of production in the face of competition located 1,000 miles from the same markets (T. 330). There of course is no such obligation. The only duties required of common carriers by the Interstate Commerce Act is to transport at reasonable, non-discriminatory and non-prejudicial rates. All this these appellees received.

The carriers, even if they were not authorized to increase their rates in the manner in which they did, still did not breach any duty to these shippers, or violate any of their rights. These shippers have not been wronged, and since they paid only a reasonable charge for the service they received, they were not damaged.

Nor are the rates shown to be prejudicial under Section 3. By their own admission, all the appellees have shown is that their rates were increased 20 per cent

while their competitors' rates were increased 6 cents per hundred (appellees' brief, pg. 25). This showing does not meet the requirements of Section 3 of the Act, Title 49 U.S.C.A. Sec. 3 (1). It presupposes that the appellees' rates and those of their competition were properly related before the increase. The appellees had no knowledge as to whether this was so, since they simply took the rates as they found them (T. 235), and argue that to increase one by 20 per cent and the other by 6 cents is prejudicial.

The appellees submitted no proof that the rates they were charged were unreasonably related to the rates charged their competitors. They offered no evidence as to the similarity or dissimilarity of the service or other transportation conditions. Nor did they prove that the defendants had it within their power to remove the claimed preferential and prejudicial relationship by raising the lower charges rather than lowering the higher charges. Unless the carrier charged with a prejudicial rate has this power, it did not create a prejudicial situation within the meaning of Section 3(1). *Texas & P. R. Co. v. United States*, 289 U.S. 627, 77 L.ed. 1410; *Union Pacific Railroad Co. v. United States of America*, 132 F.Supp. 72. Reversed in part on other grounds, *Denver & R.G.W.R. Co. v. Union P. R. Co.*, 351 U.S. 321, 100 L.ed. 1220.

Nor did the appellees show they were damaged. All that they showed was that their rates were increased by 20 per cent, and their competitors' rates were increased by 6 cents per hundred, and ask to be awarded the difference between the prior rates increased by 6 cents and the 20 per cent which was applied. This is not

enough. *Interstate Com. Commission v. United States*, 289 U.S. 385, 77 L.ed. 1273.

The fact is that, mileage considered, these appellees received more favorable treatment than their competitors. These shippers were trying to reach markets 3,500 miles from their locations. Their competitors were only 1,000 miles from these markets (T. 330). Their products had to be transported three and one-half times as far as their competitors' products. The rates they paid were far less than three and one-half times the rates of their competitors.

The Commission's finding in both decisions (T. 330 and T. 381) that the differences between the assailed and alleged preferential rates are not shown to have been or to be of a character justifying a finding that certain defendants, having effective control of the rates, subjected or subject complainants to undue prejudice, is based on the evidence, and should be affirmed.

Respectfully submitted,

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United States Court of Appeals For the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL and PACIFIC RAILROAD
COMPANY, UNION PACIFIC RAILROAD COMPANY, SOUTH-
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COMPANY and NORTHERN PACIFIC RAILWAY COMPANY,
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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR
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NORTHERN DIVISION

BRIEF OF APPELLEES

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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR
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No. 15276-77

**United States Court of Appeals
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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLEES

STATEMENT AS TO JURISDICTION

The cases below involved an appeal to the District Court by appellees from an adverse decision of the Interstate Commerce Commission (T. 388).¹ The complaints filed in the District Court (T. 3, 45) were concerned solely with reparations, whereas the cases before the Commission involved future rates and reparations. 28 U.S.C.A. Sec. 1336 (28 U.S.C. Sec. 41 (28)) applies to an order denying reparations, and such an order may be reviewed by a District Court composed

¹The Transcript of Record will be designated herein as "T."

of one judge. *United States v. Interstate Commerce Commission*, 337 U.S. 426, 93 L.ed. 1451 (1949).

STATEMENT OF THE CASE

This is an appeal from a judgment of the District Court (T. 37) reversing a decision of the Interstate Commerce Commission. Appellees originally filed complaints with the Commission against named railroads (T. 4, 46). The basis of these complaints was a decision of the Commission entered December 5, 1946, in *Ex Parte 162, Increased Railway Rates, Fares, and Charges, 1946*, 264 I.C.C. 695, and 266 I.C.C. 537 (hereinafter referred to as *Ex Parte 162*). In that proceeding the carriers had petitioned the Interstate Commerce Commission for general increases in their freight rates, and after hearing a decision was entered authorizing stated increases, and further authorizing the carriers to publish the tariff on five days' notice, the normal statutory notice period requiring thirty days' publication.

The Commission stated in *Appendix 1, of Ex Parte 162*, as follows:

“Basic freight rates, whether class or commodity, and charges, on the commodities hereinafter specified, may be increased in the amounts and in the manner set forth as to each commodity class or group. The commodity group numbers (or commodity class numbers) used in this appendix, and throughout the entire report and order, for convenience, are those specified in the order of Division Four of November 22, 1927, *In the Matter of Freight Commodity Statistics*, which was in effect at the date of submission herein, although a new

list of commodity classes with articles assigned thereto has been promulgated by order of Division One, September 24 and October 16, 1946, to become effective January 1, 1947. They are intended generally to cover the items customarily included by the carriers in their reports to the Commission under each numbered description, as of the date for the submission." (266 I.C.C. 537 at 618, T. 31)

Further on Appendix 1 set forth the following allowed increase:

"Fertilizers, n.o.s., Including Potash — Group 640.

"Diatomaceous or Infusorial Earth — Group 701.

"Twenty percent, subject to a maximum of 6 cents per 100 pounds, or \$1.20 per net ton." (266 I.C.C. 537 at 623, T. 32)

Commodity Group No. 640 of the Freight Commodity Statistics listing, referred to by the Commission, clearly included peat, ground or unground, as a fertilizer, n.o.s. (I.C.C. Ex. 5). It is thus clear that the increase in peat rates authorized in this *Ex Parte 162* decision was a 20% increase, subject to a maximum of 6 cents per 100 pounds.

The carriers, however, in the tariff issued under the authority of the *Ex Parte 162* decision, gave peat the full 20% rate increase in those cases wherein peat rates were not captioned "fertilizer" in their tariffs, and gave peat the 6 cent maximum rate in those cases wherein peat was captioned under "fertilizer" in their tariffs (T. 169, 407-411). Appellees are peat producers in British Columbia who suffered the full 20% increase, while shippers from points in the Middle West and East, and

from Eastern Canada, moved peat under the 6 cent maximum increase (T. 166, 167, I.C.C. Ex. 6 and 8).

The carriers applied the full twenty per cent increase from January 1, 1947, for practically the entire year. The result to appellees was disastrous. It should be stated that low peat rates had been originally set up to allow Western producers to enter and compete in distant markets (T. 257, 261, 273, 276-277). Eastern peat shippers made huge shipments of competitive peat into areas served by British Columbia shippers (T. 166, 180-181). The increased peat rates caused loss of market and development of peat substitutes (T. 156, 157). Appellees were unable to increase their selling prices commensurate with increased production costs during 1947 (T. 167-168). The natural result of all this was that the railroads began to lose business, and they began changing their tariff items to give appellees the benefit of the 6 cent maximum, beginning late in 1947, their master increase tariff being amended in March of 1948 (T. 197, 201-202). All rates were thus corrected except those to Northern California and the San Francisco Bay area, where the railroads persisted in giving peat the full 20% increase (T. 203). Appellees brought suit before the Interstate Commerce Commission in the companion cases of *Acme Peat Products, Ltd., et al., v. Akron, Canton & Youngstown Railroad Company, et al.*, I.C.C. Docket No. 29974, and *Alouette Peat Products, Ltd., v. Atchison, Topeka and Santa Fe Railway Company*, I.C.C. Docket No. 30260, praying for reparation for the overcharges during 1947, and praying for a correction of the rates to the Northern California and San Francisco Bay area.

After extended proceedings before the Interstate Commerce Commission, a Report and Order were entered on April 7, 1950, awarding reparation to appellees and ordering the said unauthorized increases removed (T. 321, 331). Petition for Reconsideration by the railroads was denied on January 7, 1952 (T. 354). A supplemental Order was entered on December 30, 1953, listing the exact amounts to be paid to each plaintiff by each defendant, said Order giving the carriers until February 19, 1954, to make the directed reparations (T. 356). On June 21, 1954, the railroads petitioned for leave to file a petition to re-open and reconsider (T. 369). This petition was granted (T. 377), the proceedings were re-opened, and the Commission, on reconsideration, after denying appellees' request for oral argument (T. 378) dismissed the Complaints on October 4, 1954 (T. 379, 388). Appellees' Petition for Reconsideration was denied by Order of the Commission dated January 3, 1955 (T. 406), and an appeal to the District Court followed.

Prior to filing of an appeal with the District Court, the railroads corrected the rates to Northern California and the San Francisco Bay area, and the District Court complaints prayed for reparations only. Suit in District Court was brought in each of the two cases against the United States (T. 3, 45). The Commission, and some of the railroads who had been defendants below, intervened (T. 14, 19). The two suits were consolidated by court order (T. 26) and are here upon a consolidated record. The District Court entered Findings of Fact, Conclusions of Law and Judgment reversing the Commission, finding the peat rates published purportedly

under *Ex parte 162* void, and remanding for the purpose of fixing reparations due appellees (T. 28, 37). This appeal followed.

SUMMARY OF ARGUMENT

I.

The Interstate Commerce Commission has promulgated a rule of procedure, Rule 101(f), under which it will not entertain a successive petition for rehearing upon substantially the same grounds as a prior petition. The Commission violated this rule when it entertained a second petition for rehearing by the carriers upon exactly the same grounds as a former petition. The only basis asserted for the action was that the Commission had changed its mind upon a similar set of facts in another case. This change of administrative policy is not substantially new grounds within Rule 101(f), and the violation of this Rule constituted a denial of procedural due process to appellees.

II.

The Commission authorized general rate increases in *Ex parte 162*, and in setting forth the increases allowed, utilized commodity group numbers laid down in a prior order. The carriers asserted authority to vary the commodities under such group numbers, and thus to change the rate classification of any specific item. They increased peat rates according to their own classification and without regard to the Commission's Order. The Commission held, and appellees assert, that such action was completely unauthorized.

III.

Congress has provided that no change shall be made in rates except upon thirty days' notice, provided that the Commission may modify this requirement in its discretion and for good cause shown. 49 U.S.C.A. Section 6(3). The *Ex parte 162* order provided that *authorized* increases would become effective upon five days' notice. As the peat rates in question were admittedly not authorized, neither the notice provisions of the Order or the statute have been complied with. Notice to the public is essential to the validity of rates filed, and with good reason. This case itself exemplifies the harm that may result to shippers where unauthorized rates become immediately effective: It took over a year in all for the railroads to reinstate the correct rates simply because of the time lag necessarily involved in the correction of tariffs. The purpose of the thirty-day notice provision is to allow interested parties to suspend challenged rates so that a hearing may be had before the rate change is made. When the Commission authorizes specific changes on a short notice, only those authorized changes are valid upon that notice.

IV.

The findings of the Commission that the challenged rates are reasonable and without undue prejudice or discrimination to appellees are arbitrary and without substantial supporting evidence. The evidence presented by appellees overwhelmingly showed the unreasonableness of the rates, and showed discrimination and damage to appellees. The rates were obviously more than the traffic could bear, and the lesser increase in rates gave Eastern peat shippers a decided advantage.

The Commission's findings are insufficient as they do not consider any of the evidence bearing on such factors as the effect of the rates on the movement of traffic or appellees' need of adequate transportation at the lowest cost consistent with service. The Commission concerned itself only with the question of the carrier's need of revenue, *i.e.*, the intrinsic reasonableness of the rates.

ARGUMENT

I.

The Order of June 21, 1954, granting a second petition to reopen and reconsider the proceedings constituted a denial of procedural due process to appellees.

49 U.S.C.A. Sec. 17 (6) governs rehearing and reconsideration of the Commission's decisions and orders and provides, among other things, as follows:

“ * * * Such applications shall be governed by such general rules as the Commission may establish. * * * ”

Under the authority of this statute the Commission promulgated Rule 101 (f) of its General Rules of Practice, as follows:

“Successive petitions on same grounds, not entertained. A successive petition under this section submitted by the same party or parties, and upon substantially the same grounds as a former petition, which has been considered and denied by the entire Commission will not be entertained.” 49 U.S.C.A. Appendix, Rule 101 (f).

The proceedings in the instant cause before the Interstate Commerce Commission were closed by the order of April 7, 1950, granting the relief the appellees

had prayed for (T. 331). The appellant carriers (the defendants below) thereafter properly petitioned for reconsideration and that petition was denied (T. 354). The reparations, as finally computed, were ordered to be paid to appellees on or before February 19, 1954, yet on June 21, 1954, the Commission granted leave to reopen and file a petition for reconsideration and granted reconsideration (T. 377). The sole basis for this petition for leave to file a petition to reopen was the case of *F. W. Bolgiano & Co., Inc., v. Baltimore & O. R. Co.*, 291 I.C.C. 659, wherein the Commission reached a result contrary to that reached in the instant case. Every argument stated in the petitions of the railroad appellants filed on June 21, 1954 (T. 369, 371) was contained at length in their original petition for reconsideration filed June 22, 1950 (T. 333). In their briefs filed before this Court, appellants clearly state that the sole basis for the reconsideration was the *Bolgiano* case, *supra*. It is submitted that under its own rule the Commission did not have authority to entertain this successive petition.

The law is clear that the regulations of a government agency, duly promulgated and published, have all the binding force and effect of law, *U. S. v. Springfield Fire & Marine Ins. Co.*, 107 F.Supp. 753 (D.C. Mo. 1952) *aff'd* 207 F.(2d) 935 (C.C.A. 8th, 1953), and their violation, even by the administrator himself, constitutes in legal effect a violation of the statute. *Jeffries v. Olesen*, 121 F.Supp. 463 (D.C. Cal., 1954) ; *U.S. v. Shaughnessy*, 347 U.S. 260, 98 L.ed. 682 (1954) ; *Chapman v. Sheridan-Wyoming Coal Co., Inc.*, 338 U.S. 621, 94 L.ed. 393 (1950) ; *Bridges v. Wixon*, 326 U.S. 135, 89

L.ed. 2103 (1945); *U. S. v. Finn*, 127 F.Supp. 158 (D.C. Cal., 1954); *McKay v. Wahlenmaier*, 226 F.(2d) 35 (C.A.D.C. 1955). The *Jeffries* case, *supra*, stated that where the regulations set a higher standard of procedural due process than required by constitution or statute, the violation thereof is a denial of administratively established due process of law.

None of the cases cited in the briefs of appellants meet the issue of whether or not the Administrator can violate his own rules and regulations. The case of *Baldwin v. Scott Milling Co.*, 307 U.S. 478 (Brief of Commission, 17) involved the interpretation of the statute which clearly gives the Commission authority to grant a rehearing at any time. That case did not involve Rule 101 (f) under which the Commission has regulated its own authority. The cases of *Interstate Commerce Commission v. Jersey City*, 322 U.S. 503, and *U.S. v. Pierce Auto Lines*, 327 U.S. 515 (Brief of Commission, 20) are again not in point, those cases involving the question of whether a litigant can demand a rehearing as a matter of law because of a change of circumstances, and because the record has grown stale. The case of *Shein v. United States*, 102 F.Supp. 320 *aff'd* 343 U.S. 944 (Brief of Commission, 20, 21) involved no question as to the right to a rehearing, the plaintiff's position in that case being that the Commission having reported favorably on its application upon the evidence before it, could not upon reconsideration reverse its position and deny the application without taking new evidence.

It is submitted that the granting of a successive petition for rehearing years after the case was closed, and

after appellees had gone to great expense to file statements showing the exact reparations due, and in the face of the Commission's own rule, is a clear denial of procedural due process to these appellees, as was found by the lower court. The position of appellants that the Commission's change of heart in the *Bolgiano* case, *supra*, is sufficient to remove the case from the rule would be not only a strained construction of the rule, but would emasculate it entirely. Under even the most liberal interpretation of the rule, the Commission's change of mind cannot be a substantial new ground authorizing a successive rehearing. It has been stated that an administrative decision may not be repudiated for the sole purpose of applying some quirk or change in administrative policy, even the power of executive agencies being not without limit. *Chapman v. El Paso Natural Gas Co.*, 204 F.(2d) 46 (C.A. D.C. 1952).

II.

The carriers acted in contravention of *Ex parte 162* in publishing peat rates subject to the full twenty per cent increase.

Ex parte 162 authorized an increase in rates on fertilizers n.o.s., group 640, of twenty per cent subject to a six-cent maximum. Although peat is included under Group 640, the carriers published the six-cent maximum on peat rates only when it was carried in their tariffs as a fertilizer. Where peat had a separate commodity rate in their tariffs, it was given the full twenty per cent increase (T. 324).

Appellant railroads in their first argument (Brief, 11) urge that under the *Ex parte 162* order the car-

riers were required only generally to apply the increases to commodities as listed for statistical purposes, and that they had authority to vary the statistical commodity listings as they saw fit.

This argument was rejected by the Interstate Commerce Commission from the very beginning (T. 326-327, 382). The argument of the railroads centers around the single sentence in the Appendix to *Ex parte 162*:

“They are intended generally to cover the items customarily included by the carriers in their reports to the Commission under each numbered description, as of the date for the submission.” (T. 323-324)

It is submitted that this sentence is taken out of context. The first sentence in that paragraph is the controlling direction to the carriers as to the amount and manner of making increases and reads as follows:

“Basic freight rates, whether class or commodity, and charges, on the commodities hereinafter specified, may be increased in the amounts and in the manner set forth as to each commodity class or group.” (T. 323)

The Commission then continues in that paragraph, after making this direct statement, to explain what commodity groups they have reference to. The next two sentences are a rather long explanation concerning these commodity group numbers, this explanation including the above mentioned sentence relied on by appellant railroads to the effect that they (the commodity group numbers) are intended to cover items customarily included by the carriers in their report.

The Commission never had the slightest intention

that the individual carriers could vary the commodities commonly reported under these group numbers and place such commodities under other classifications, thus subjecting them to different freight rates. If this were the case, wherever individual carriers varied in their tariffs, varying increases throughout the country would result. The appellant carriers have not denied that they commonly and customarily report peat under Item 640 of the statistical listing; they rely on the fact that they carry it under different headings in their own tariffs to remove them from the directions given in *Ex parte 162*.

III.

The peat rates issued by the railroads under the ostensible authority of *Ex parte 162* were void in law and the carriers had no authority to make any charges except under the former tariffs in effect.

There was no publication of the peat rates as required by law in this case. The statutory requirement of publication is as follows:

“Change in rates, fares, etc.; notice required; simplification of schedules. No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days’ notice to the commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to

public inspection: *Provided*, That the commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further*, That the commission is authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges or classifications not changed if, in its judgment, not inconsistent with the public interest." 49 U.S.C.A. Sec. 6 (3).

It is thus a requirement of statute, which the Commission may not override, that there either be a compliance with the notice provisions provided therein, or compliance with an order of the Commission applying to the particular case at hand. The purpose of the statute is, of course, to give notice to the public and to allow them to protest and suspend rates prior to their taking effect. It is submitted that in those instances wherein the Commission determines that this safeguard shall be dispensed with, that there must be strict compliance with such order. The order of the Commission in *Ex parte 162* directed that *authorized* increased rates and charges may be made effective upon not less than five days' notice to the Commission and the general public. 266 I.C.C. 537 at 617. As the peat rates complained of were not authorized increases, the carriers

cannot bring themselves within the five-day notice provision. And they, of course, did not publish any thirty-day statutory notice. In short, there is no publication of any kind here, and the rates are, therefore, null and void.

The position of the appellants is exemplified by the statement of the Commission in the Report of October 4, 1954, as follows:

“—the defendants are subject to censure for improper tariff publication but that situation alone does not afford an adequate basis for a finding of unreasonableness or an award of reparation, since we have no authority to award punitive or exemplary damages.” (T. 382)

We thus have a finding of fact in this case by the Interstate Commerce Commission that the tariff contravened their order and that it was published without any authority, followed by their conclusion of law that appellees were not entitled to relief therefor.

The appellants make much of the argument that if rates are declared void or inapplicable although filed that the shipper would be charged with knowledge that he does not and frequently could not possess; they urge that public policy requires that tariffs when filed contain the applicable rates as soon as filed. Appellees do not urge that errors or mistakes in a *published* tariff void the same, our position going solely to the question of notice and proper publication. It cannot be over-emphasized that in the normal case of tariff changes there is a thirty-day publication period during which all interested parties have an opportunity to peruse the tariffs and challenge any part thereof. In the instant

case the tariffs became effective upon only five days notice (T. 407, 409). This period of notification covered the Christmas holiday season at the end of 1946, the tariffs becoming effective January 1, 1947. There was thus no opportunity for persons or parties who might be injured by the rates and charges to suspend such rates pending a hearing (T. 327). The rates were in effect three months before appellees knew the full twenty per cent increase was being assessed (T. 194), and appellees only obtained relief from the exorbitant rates as a result of an appeal to the carriers, and the carriers' modification of their tariffs in the various rate territories between December 1, 1947, and March 29, 1948 (T. 260, 314).

In the original Report of April 7, 1950, the Commission stated:

"These rates were increased by defendants under color of approval by this Commission in a general revenue proceeding in which authority was sought, because of an emergency, to depart from the usual method of rate publication and to reduce the statutory filing time for the tariffs.— In publishing the rates on peat here considered, however, defendants disregarded the maximum which the Commission had prescribed in connection with its approval of a percentage increase. As these increases were named in tariffs which became effective on short notice, complainants were prevented from exercising the statutory right that otherwise would have been available to enter protest before the increased rates took effect. It is our opinion that the complainants, who paid the unauthorized increases, are entitled, under the Interstate Commerce Act, to be placed in the same situa-

tion in which they would have been had the defendant carriers complied with our order. Section I requires that rates and charges be both just and reasonable." (T. 328-329)

Appellants rely most heavily upon the case of *Davis v. Portland Seed Co.*, 264 U.S. 403, 68 L.ed. 762 (1923), as authority for the proposition that a rate which is filed is the applicable and legal rate although improperly published. The *Davis* case only indirectly involved the improperly published rate and there is no direct challenge of that rate as such. The shippers there alleged that they were overcharged under the correctly published rate for their haul because there was an improperly published lower rate for a longer haul, thus bringing the carriers within the violation of that section of the statute prohibiting publication of a greater rate for a short haul than that published for a longer haul. The court held that the mere publication of the forbidden lower rate did not efface the higher intermediate rate which was a properly published rate.

The only case which appellees have found which is directly in point is the case of *Illinois Central R. Co. v. Van Duesen-Harrington Co.*, 170 Minn. 488, 212 N.W. 940 (1927) *cert. den.* 275 U.S. 554. In that case the Interstate Commerce Commission had authorized a carrier to issue a supplement to its tariff on less than statutory notice, cancelling and re-issuing a former supplement, unchanged except to correct a specified mistake. In the new supplement a rate of 17.5 cents, which should not have been changed, appeared as 1.5 cents. The court stated that tariff rates filed and published under the Interstate Commerce Act are binding and

conclusive on the carrier and shipper until changed in a manner provided by law. It was held that the 1.5 cent rate was not a lawful rate as it was not authorized by the Commission and a statutory notice was not given. The court said the new supplement was issued in violation of both the statute and the Order of the Commission, which is exactly the case now being appealed.

The Supreme Court has recognized this rule in *United States v. Miller*, 223 U.S. 599, 56 L.ed. 568 (1912), wherein the court upheld a tariff against the argument that the failure to have it posted at a particular place invalidated it. The court stated that publication is a step in establishing rates while posting is a duty arising from the fact that they have been established, and that the posting is not a condition to making a tariff legally operative. *Accord: Chicago, I. & L. Ry. Co. v. International Milling Co.*, 43 F.(2d) 93 (C.C.A. 8th, 1930) *cert. den.* 282 U.S. 885.

A Congressional policy is clearly shown in 49 U.S.C.A. Section 6 (3) to give the general public notice of a proposed change before its effective date. Where the normal notice is dispensed with and this is to be "for good cause shown," surely the public should be protected at least to the extent that the order of the Commission be obeyed. That a rate unauthorized by the Commission may be pushed through on such a short notice that the public has no opportunity to protest is inconceivable. The legal conclusion of the Commission that an "improperly" published tariff is nevertheless applicable is contrary to law, and where agency action is a clear mistake of law applied to the admitted facts the courts will grant relief. *Jeffries v. Olesen*, 121 F.

Supp. 463 (D.C. Cal. 1954) ; *U.S. v. I.C.C.*, 198 F.(2d) 958 (C.A. D.C. 1952), *cert. den.* 344 U.S. 893. The District Court correctly held the improperly published peat rates void and held the prior rates were the only ones applicable.

IV.

The twenty per cent increase in peat rates was unreasonable and created undue prejudice and discrimination to the appellees, and the findings of the Commission to the contrary are arbitrary and without substantial supporting evidence.

Assuming that a rehearing was properly had and that the rates charged to appellees were the legal and applicable rates, the question arises whether the Commission was arbitrary in finding that the rates were reasonable and did not create any undue prejudice to appellees under Sections 1 and 3 of the statute.

In reparation cases the Commission acts quasi-judicially and the rules of evidentiary law should be more carefully observed than when the Commission is acting in a quasi-legislative capacity; the evidence should be as competent and conclusive as is necessary to support a judgment in an action at law. *Hackney Bros. Body Co. v. New York Central R. Co.*, 85 F.Supp. 465 (D.C. N.C. 1949) ; *Pitzer Transfer Corp. v. Norfolk & W. R. Co.*, 10 F.Supp. 436 (D.C. Md. 1935). In *United States v. Interstate Commerce Commission*, 198 F.(2d) 958 (C.A. D.C. 1952), *cert. den.* 344 U.S. 893, which was the first reparation order accorded direct judicial review, the court stated that it would apply the standards of judicial review applicable to administrative actions as reflected in the administrative procedure act,

and held that the Order would be reviewed to determine whether it was entered arbitrarily and without substantial supporting evidence, or in defiance of law or the standards established by Congress to determine when reparations are due. See also, *Salvino v. United States*, 119 F.Supp. 277 (D.C. Wash. 1954); *Old Colony Furniture Co. v. U.S.*, 95 F.Supp. 507 (D.C. Mass. 1951); *Hudson Bus Transportation Co. v. U.S.*, 90 F. Supp. 742 (D.C. N.J. 1950); *Acme Fast Freight v. U.S.*, 116 F.Supp. 97 (D.C. Del. 1953).

A. Unreasonableness Under Section 1

Section 1 (5) provides as follows:

“All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.” 49 U.S.C.A. Section 1 (5).

Section 1 (6) provides in part as follows:

“*Classification of property for transportation; regulations and practices.* It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce just and reasonable classifications of property for transportation,—and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.” 49 U.S.C.A. Section 1 (6).

It should be pointed out that if rates are found unreasonable under Section 1, no specific proof of damage is necessary, but if they are reasonable there can still be reparation if there is specific damage flowing from

such violation. *U.S. v. I.C.C.*, 198 F.(2d) 958 (C.A. D.C. 1952), *cert. den.* 344 U.S. 893; *Great Northern R. Co. v. Sullivan*, 294 U.S. 458, 79 L.ed. 992 (1935); *I.C.C. v. U.S.*, 289 U.S. 385, 77 L.ed. 1273 (1933). The general tendency of the law, as stated in *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 62 L.ed. 451 (1918), in regard to damages, is not to go beyond the first step where the plaintiffs suffered losses when they paid the unreasonable charges, as the carrier ought not to be allowed to retain his illegal profit.

The basic peat rates that were in effect at the time of the *Ex parte 162* proceedings were voluntarily established by the carriers and had been maintained over a long period of time (T. 257-258, 276-277). These rates had been established with a view to providing a rate that would enable Pacific Coast producers to meet competition (T. 261, 273). There is a presumption that rates so maintained are reasonable. *Skinner & Eddy Corp. v. U.S.*, 249 U.S. 557, 63 L.ed. 772 (1919). The question then before the Commission was whether the rates as increased were reasonable and just. Appellants have stated that appellees' position is that the increase is unreasonable, without regard to the reasonableness of the entire rate; appellees' position, of course, is that the rate as increased was unreasonable. Appellants further urge that they could have been charging appellees a higher rate right along and that if they had raised the rate through the years, that such rate would be higher than the increases here complained of. Appellees submit that such an argument is beside the point. A rate satisfactory to all had been established by the railroads and this rate is presump-

tively reasonable. There is no evidence whatsoever that any such increases would have resulted in just and reasonable rates. It is undisputed that the railroads had to voluntarily reduce the twenty per cent increase they placed upon peat rates. No clearer evidence could be had that such an increased rate was unreasonable and was more than the traffic would bear.

Appellants contend that the Commission in *Ex parte 162* determined the reasonableness of the increase and not of the rate as increased. The *Ex parte 162* decision did determine that it would not be in the public interest to increase peat rates more than the six-cent maximum. Yet the Commission in the instant case determined that charging over that maximum is reasonable. Again the Commission itself has held that carrier application of emergency charges different from those authorized by the Commission was unreasonable. *Adams Lumber Co. v. A.C. & Y.R. Co.*, 253 I.C.C. 179.

The Report and Order of the Commission of October 4, 1954 (T. 379-389), concluded that there was no evidence of unreasonableness in this case (T. 386). The only substantiating findings of fact by the Commission are facts showing the car revenue and the statement that the railroads had not taken the full rate increases in the past, which would have been allowed. The Commission disregarded and did not consider the evidence submitted by appellees, basing its result solely upon railroad revenue considerations, which, standing alone, is insufficient. As showing that the Commission did not use the proper basis in determining reasonableness, the Congressional policy as shown in 49 U.S.C.A. Section

15 (a) may be cited. It is there stated that in prescribing just and reasonable rates the Commission shall consider the effect of the rates on the movement of traffic, the need of adequate railroad transportation at the lowest cost consistent with the service, and the carrier's need of revenue.

The evidence introduced before the Commission by appellee's witnesses showed that the twenty per cent increase in peat rates adversely affected the sale of the product (T. 156, 157, 161, 166, 180, 181, 242) and opened the way for a more extensive use of substitutes (T. 154, 156). The evidence showed that some producers had to make an allowance in price in order to compete at all and that prices could not be raised although production costs had gone up (T. 242, 167). While it is true that the car revenue was low, this is not the only consideration. Appellees showed that peat shippers do not require special or top quality cars, but use any type of closed equipment available, and that claims are not made against the railroads by peat shippers (T. 241). These factors very definitely affect the income of the railroads and the desirability of this type of business.

It was stated in *Mississippi Public Service Commission v. U.S.*, 124 F.Supp. 809 (D.C. Miss. 1954) *aff'd* 349 U.S. 908, that in fixing reasonable rates competition is one of the elements to be considered and is frequently controlling, the court adding that in determining the legal question as to whether the evidence amounts to substantiality the court must likewise weigh such factors. The Commission itself has held that subsequent voluntary reduction of rates, considered with other evidence, creates a presumption that the prior rates were

unreasonable. *Terrill Machine Co. Inc. v. Central Vermont R. Inc.*, 255 I.C.C. 795; *Harding Glass Co. v. S.L.-S.F. R. Co.*, 253 I.C.C. 550. In *U.S. v. I.C.C.*, 198 F.(2d) 958 (C.A. D.C. 1952) *cert. den.* 344 U.S. 893, where the shipper complained of unlawful wharfage charges, the carriers contended that a higher rate might have been published. The court said that if such a defense could be urged, an *ad hoc* amendment of the tariff would result.

It is appellees' position that the Commission's Findings show that all factors were not considered and further that the overwhelming weight of the evidence shows the rates charged were unreasonable. It is clear that the Commission must set forth in its report the basic or essential or quasi-jurisdictional findings necessary to support its ultimate conclusion, *New York Central R. Co. v. U.S.*, 99 F.Supp. 394 (D.C. Mass. 1951) *aff'd* 342 U.S. 890, 96 L.ed. 667; *United States v. Chicago, M. St. P. & P. R. Co.*, 294 U.S. 499, 79 L.ed. 1023 (1935); *DuBois v. Central R. Co. of New Jersey*, 22 F.Supp. 469 (D.C. N.J. 1938), and the settled policy of the law is to require every tribunal to reduce its essential findings to writing; the grounds upon which such tribunal's Order must be judged are those upon which the record discloses that Order was based. *Cantley & Tanzola v. U.S.*, 115 F.Supp. 72 (D.C. Cal. 1953). And see *Meeker v. Lehigh Valley R. Co.*, 236 U.S. 412, 59 L.ed. 644 (1915) and *Mills v. Lehigh Valley R. Co.*, 238 U.S. 473, 59 L.ed. 1414 (1915).

B. Discrimination Under Section 3

Section 3 (1) of the Act provides as follows:

"It shall be unlawful for any common carrier

subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." 49 U.S.C.A. Section 3 (1).

The finding of the Commission that there was no undue prejudice is arbitrary and contrary to the substantial weight of the evidence. The substantial weight of the evidence in this case was to the effect that Eastern peat shippers, in direct competition with the Western peat shippers and serving the same areas, enjoyed the six-cent maximum at the same time that the Western peat shippers suffered the full twenty per cent increase (T. 324-325 and I.C.C. Ex. 6). There was no justification given for this difference, and the actual and admitted reason was that in the tariffs applied to the Eastern shippers peat was carried under the fertilizer classification, whereas in the tariffs applying to the Western shippers, peat was given a separate commodity classification (T. 265-268). It is submitted that in view of the extensive and very serious damage which

resulted to Western shippers, this is a poor excuse indeed.

Unjust discrimination has been found even where rates were reasonable where it is shown that the discrimination is not justified by the cost of the respective services, their values, or their transportation conditions. *New York v. U.S.*, 331 U.S. 284, 91 L.ed. 1492 (1947), *Reh. den.* 331 U.S. 866; *U.S. v. Illinois C. R. Co.*, 263 U.S. 515, 68 L.ed. 417 (1924). The court, in the *Illinois Central Railroad* case, stated that the fact that a discriminatory rate is inherently reasonable and that other rates are not unreasonably low does not establish that discrimination is just as both rates may be within the zone of reasonableness and yet result in undue prejudice. See also *Chesapeake & O. R. Co. v. U.S.*, 11 F.Supp. 588 (D.C. Va. 1935) *aff'd* 296 U.S. 187.

The substantial weight of the evidence shows damage to appellees, which damage was a direct result of the increased rates charged appellees. If by reason of the discrimination the preferred producers have diverted business, or if the discrimination has forced the shipper to sell at a lower market price, there is measurable damage to the shipper. *I.C.C. v. U.S.*, 289 U.S. 385, 77 L.ed. 1273 (1933); *Pennsylvania R. Co. v. Terminal Warehouse Co.*, 78 F.(2d) 591 (C.C.A. 3rd 1935) *aff'd* 297 U.S. 500.

CONCLUSION

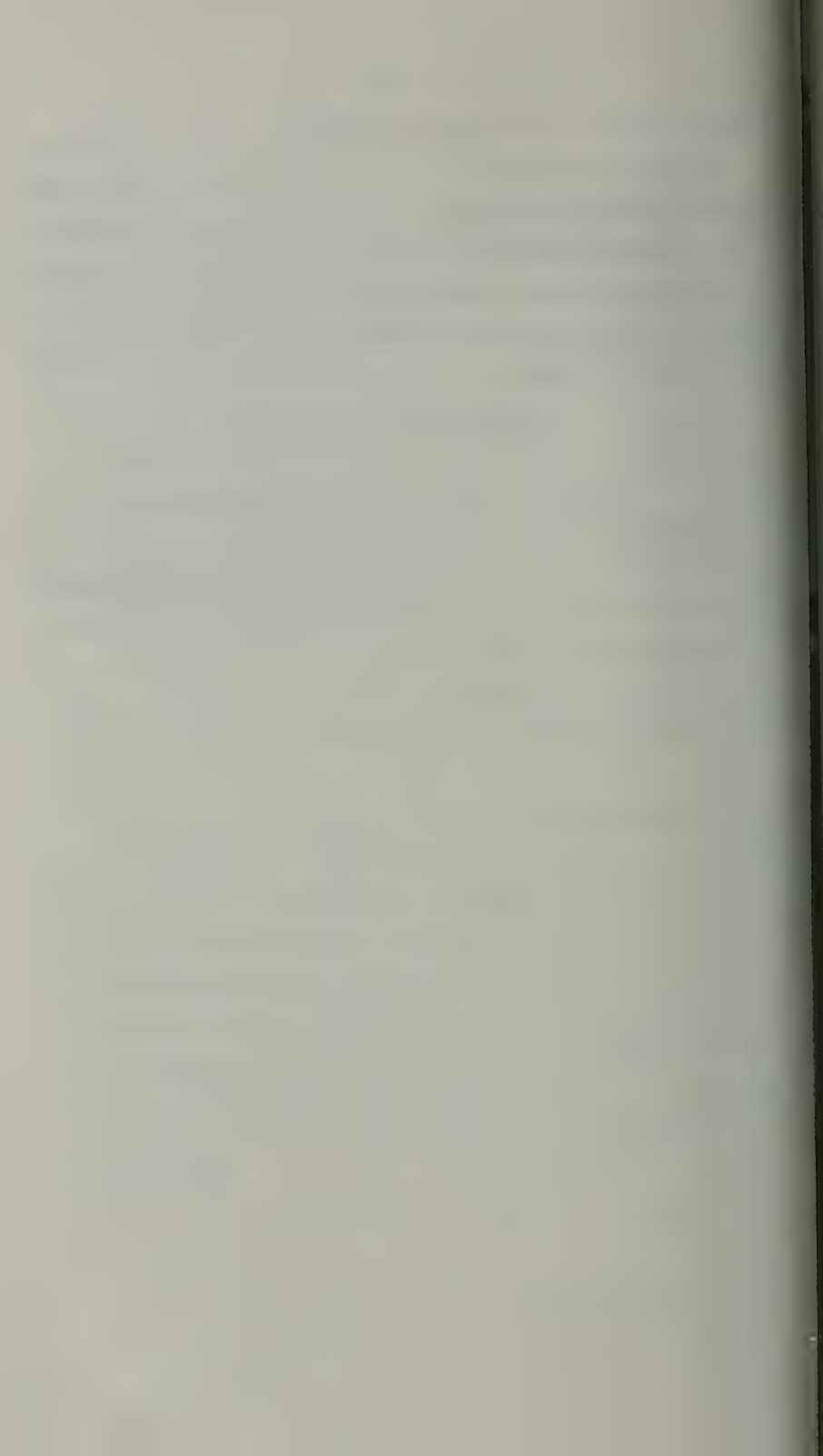
For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed and these proceedings remanded to the Interstate Commerce Commission for the purpose of fixing reparations in accordance with the judgment of the District Court.

Respectfully submitted,

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Nos. 15276-77

**In the United States Court of Appeals
for the Ninth Circuit**

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD
COMPANY, UNION PACIFIC RAILROAD COMPANY,
SOUTHERN PACIFIC COMPANY, GREAT NORTHERN
RAILWAY COMPANY AND NORTHERN PACIFIC RAILWAY
COMPANY, APPELLANTS

v.

ALOUETTE PEAT PRODUCTS, LTD., ET AL., APPELLEES

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

ALOUETTE PEAT PRODUCTS, LTD., ET AL., APPELLEES

~~APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION~~

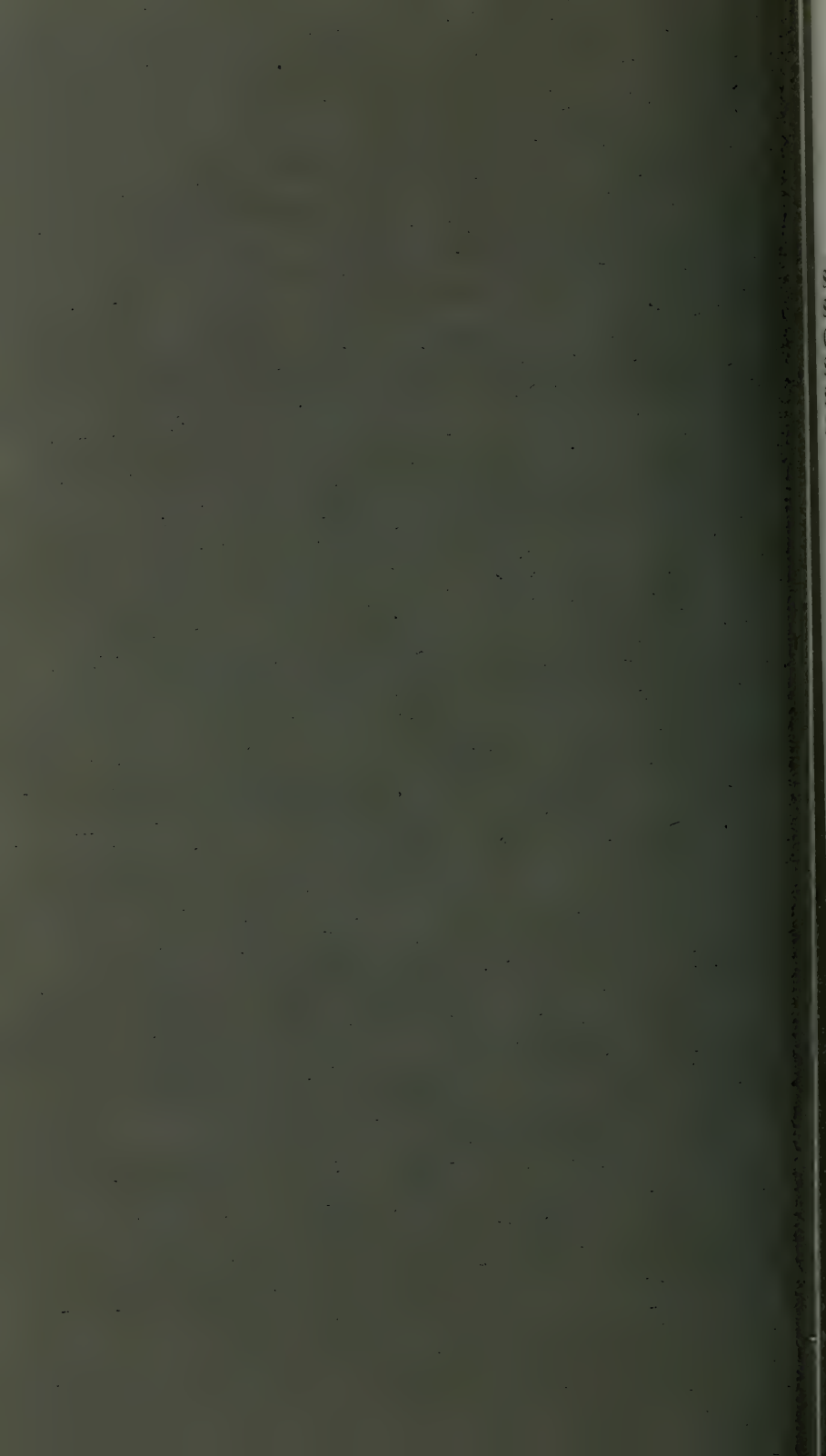
BRIEF FOR INTERSTATE COMMERCE COMMISSION, APPELLANT

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Washington 25, D. C.*

FILED

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In the United States Court of Appeals for the Ninth Circuit

Nos. 15276-77

**CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD
COMPANY, UNION PACIFIC RAILROAD COMPANY,
SOUTHERN PACIFIC COMPANY, GREAT NORTHERN
RAILWAY COMPANY AND NORTHERN PACIFIC RAILWAY
COMPANY, APPELLANTS**

v.

ALOUETTE PEAT PRODUCTS, LTD., ET AL., APPELLEES

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

ALOUETTE PEAT PRODUCTS, LTD., ET AL., APPELLEES

***APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION***

BRIEF FOR INTERSTATE COMMERCE COMMISSION, APPELLANT

STATEMENT AS TO JURISDICTION

The appeal by the Interstate Commerce Commission filed August 18, 1956 (R. 41), is from the final judgment of the District Court for the Western District of Washington, Northern Division, entered June 19, 1956 (R. 37), setting aside an order (R. 388) of the Interstate Commerce Commission dismissing the complaints of appellees which sought awards of reparation from the intervening railroads. The District

Court did not write an opinion but filed its findings and conclusions (R. 28) which are not reported. The two reports of the Commission (R. 320 and 379), upon which its order is based are found at 277 I. C. C. 641 and 293 I. C. C. 510.

The jurisdiction of this court to review this judgment is conferred by 28 U. S. C. 225. See opinion of this court in *Interstate Commerce Commission, et al. v. Martin Brothers Box Company*, 219 F. 2d 811.

STATEMENT OF THE CASE

In the administrative proceeding,¹ appellees had sought reparation on carload shipments of ground peat which moved during a fifteen-month period beginning in January 1947 from points in British Columbia to points in the United States. Appellees also sought, for the future, lower rates on ground peat moving from points in British Columbia to points in northern California (R. 321-322).

The Commission originally granted the relief sought but by its order of June 21, 1954, reopened the proceedings for further consideration, and by report and order dated October 4, 1954, reversed its original action. The order of January 3, 1955, denied appellees' petition for reconsideration (R. 320, 377, 379 and 406).

The matter had its origin in a prior Commission proceeding, *Ex Parte No. 162, Increased Railway*.

¹ Docket No. 29974, *Acme Peat Products, et al. v. Akron, C. & Y. R. Co.* Embraced in this docket was the companion case styled Docket No. 30260, *Alouette Peat Products v. The Atchison, Topeka and Santa Fe Ry. Co.*

Rates, Fares, and Charges, 1946, 266 I. C. C. 537, hereinafter referred to as the *General Increase* case. There the railroads were granted permission to make certain general increases effective January 1, 1947, in their basic freight rates in order to improve their unfavorable financial position. In making the increases effective, the carriers published one increase on peat rates when that commodity was listed in the tariffs under the fertilizer group and a higher increase where a separate commodity rate applied. The rates on peat from British Columbia were accorded the higher increase and resulted in the proceeding before the Commission which is here under review. A more detailed background of the case is shown in the first report, where the Commission stated (R. 323-325):

The Commission set forth in general terms how the general increases authorized December 5, 1946, should be applied. In the appendix to the report, 266 I. C. C. at page 618, it stated:

"Basic freight rates, whether class or commodity, and charges, on the commodities hereinafter specified, may be increased in the amounts and in the manner set forth as to each commodity class or group. The commodity group numbers (or commodity class numbers) used in this appendix, and throughout the entire report and order, for convenience, are those specified in the order of division 4 of November 22, 1927, *In the Matter of Freight Commodity Statistics*, which was in effect at the date of the submission herein, although a new list of commodity classes with articles assigned thereto has been promulgated

by order of division 1, September 24 and October 16, 1946, to become effective January 1, 1947. They are intended generally to cover the items customarily included by the carriers in their reports to the Commission under each numbered description, as of the date for submission."

In the case of rates on fertilizers n. o. s. [not otherwise specified] group 640, an increase of 20 percent, subject to a maximum of 6 cents per 100 pounds or \$1.20 per net ton, was authorized. Although peat, ground or unground, is included in the group of commodities listed under group 640, the carriers, in publishing increased rates as authorized, published a 6-cent maximum increase in rates on peat only when that commodity was carried in the tariffs in the fertilizer group. In instances where a separate commodity rate was published for peat, the full 20-percent increase, authorized on basic freight rates generally, was published. As the rates applying on peat from points in British Columbia to destinations in the United States were separate commodity rates, they were, on January 1, 1947, made subject to the full 20-percent increase. The rates sought are the basic rates in effect prior to January 1, 1947, increased in the manner that rates on fertilizers were increased.

The carriers gave the matter of increases further consideration on representations that rates on peat from origins in eastern Canada to points in the United States east of the Mississippi River were on the fertilizer basis and were increased a maximum of 6 cents. As a result thereof, defendants reduced the trans-

continental rates on peat between and on December 1, 1947, and March 29, 1948, to reflect a maximum increase of 6 cents. However, prior to March 29, 1948, when defendants amended their master tariff [footnote omitted] to show the 6-cent maximum increase applicable to rates on peat, they republished rates thereon from the origins in British Columbia to points in northern California hereinbefore referred to, adding to the basic rates the full 20-percent increase, and withdrawing those rates from the application of the master tariff. Those are the only rates now in effect that are assailed by complainants.²

Hearing on the complaints filed with the Commission was held before an examiner of the Commission on November 10, 1948, at Seattle. Thereafter, following the filing of briefs, an examiners' proposed report was served. The examiners were of the view that appellees had failed to show that the assailed rates were unreasonable under Section 1 of the Interstate Commerce Act, or unduly prejudicial under Section 3, or inapplicable under Section 6. The examiners recommended that the complaints be dismissed (R. 309).

² Appellees in Civil Action No. 3924 in the District Court in paragraph III of their complaint, stated that these rates to northern California points have now been reduced and that "no review is being sought in regard to or relief asked as to present rates charged by the railroads in this proceeding" (R. 51). The matter left for judicial review, then, was simply the Commission's refusal to award reparation. As such it was reviewable in a regularly constituted District Court of one judge. *United States v. Interstate Commerce Commission*, 337 U. S. 426, 443.

Appellees filed their exceptions to the proposed report and the railroads filed their reply. Oral argument was then had before a division³ of the Commission which thereafter issued its report and order under date of April 7, 1950 (R. 320). The division agreed with the examiners that appellees had not shown the assailed rates to be inapplicable under Section 6 of the Interstate Commerce Act or unduly prejudicial under Section 3. However, the division concluded that the Commission in the *General Increase* case, *supra*, had not intended that different increases should be applied to the same commodity and held the assailed rates to be unreasonable in violation of Section 1 (5) under an unprecedented theory of "unjust enrichment." Prior to this decision, the Commission had consistently held that in determining reasonableness under Section 1 the *total* rate or charge must be considered. The carriers had introduced evidence tending to show that the basic rates on peat were less than maximum reasonable rates and that as increased the total charge was still well within the zone of reasonableness. The division said that such evidence "misses the crux of the issue here presented" and concluded (R. 329-330):

In the instant proceeding, the collection by defendants of charges which included increases in excess of those authorized by the Commis-

³ The entire Commission consists of eleven members. It functions primarily through divisions consisting of three members each. Ordinarily a party dissatisfied with an order of a division may petition the entire Commission for reconsideration. 49 U. S. C. 17.

sion clearly resulted in unjust enrichment of defendants at complainants' expense. It follows that reparation on past shipments to the extent of this unjust enrichment is warranted,
* * *.

Thereafter, the railroads filed a petition for reconsideration by the entire Commission which was denied by order dated January 7, 1952. The parties then submitted their Rule 100⁴ statement showing the amount due under the Commission's findings and under date of December 30, 1953, the Commission issued its order under 49 U. S. C. 16 (1) setting forth the amount due appellees which the carriers were directed to pay by February 19, 1954. Most, if not all, of the carriers elected not to pay the amounts found due and to await the shippers' court action based upon the Commission's order (49 U. S. C. 16 (2)).

Ordinarily the Commission's action of December 30, 1953, would have terminated the administrative proceeding. However, at about the same time the Commission, in another proceeding,⁵ hereinafter referred to as the *Bolgiano* case, containing facts and arguments substantially similar to those here, had reversed its ruling based upon the newly devised "unjust enrichment" theory. That proceeding involved shipments of humus from Hyper-Humus, N. J., to points in several eastern states. The carriers here

⁴ This rule, together with all pertinent statutory provisions, is quoted in the Appendix to this brief.

⁵ *F. W. Bolgiano & Co., Inc. v. Baltimore & O. R. Co.*, 291 I. C. C. 659.

involved then filed (March 8, 1954) their petition for leave to file a further petition for reconsideration on the strength of the Commission's action in the *Bolgi-ano* case. The petition was granted over appellees' objection and by order of June 21, 1954, the Commission reopened this proceeding for reconsideration.

Under date of October 4, 1954, the Commission issued its report and order on reconsideration. In that report the Commission reaffirmed its prior rulings that there was no showing on this record of violation of Sections 6 and 3 of the Act. Thus the Commission stated (R 381):

As stated by the division in the prior report the complainant's contention that the assailed rates were not applicable has no merit, since a rate published in a tariff on file with this Commission does not become inapplicable by reason of the fact that it contravenes an order of the Commission or was published on short notice without authority.

And

For the reasons stated in the prior report, there is no showing of undue prejudice.

However, on the issue of reasonableness under Section 1 the Commission reversed its prior ruling based upon the unprecedented "unjust enrichment" theory, examined the evidence concerning the reasonableness of the *total* charge involved and found that the evidence did not afford a sound basis for a finding of unreasonableness. The complaints were dismissed.

Appellees then filed a petition for reconsideration to which the railroads replied and that petition was de-

nied by order dated January 3, 1955. The court actions, one filed by Alouette Peat Products, Ltd., and the other by Acme Peat Products, Ltd., et al., followed. Since the two actions involved common questions of law and fact the court, by order and upon stipulation of counsel, consolidated them (R. 26).

Appellees alleged in their complaints (1) that the Commission had no authority to make its order of June 21, 1954, reopening the proceeding for further consideration, and (2) that the report and order of October 4, 1954, denying reparation and the order of January 3, 1955, denying reconsideration, were invalid.

Appellees filed a certified copy of the administrative record with the court, briefs were filed and the cause was argued before Honorable John C. Bowen, United States District Judge, at Seattle, Washington, on June 12, 1956. On June 19, 1956, the court entered its findings and conclusions as well as the final judgment setting aside the Commission's orders (R. 28-37).

The court held (1) that the Commission's order of June 21, 1954, reopening the proceeding for reconsideration amounted to a denial of due process to appellees, (2) that the assailed rates published and filed on less than 30 days' notice without express Commission approval were illegal and void, and (3) that those rates damaged appellees by causing a loss of market. The court remanded the matter to the Commission for the purpose of entering a reparation order.

QUESTIONS INVOLVED

The questions raised on appeal are these:

1. Did the Commission have authority to enter its order of June 21, 1954, thereby reopening the administrative proceeding for reconsideration? If so,
2. Are the assailed rates published in a tariff on file with the Interstate Commerce Commission null and void because they were published on short notice without specific Commission authority? If not,
3. Are the Commission's orders of October 4, 1954, and January 3, 1955, dismissing complaints seeking reparation based upon adequate findings which in turn are supported by substantial evidence in the record considered as a whole?

SPECIFICATION OF ERRORS RELIED UPON

1. The District Court erred in finding—

That the increase in rates damaged the plaintiffs in this case by causing a loss of market. (Finding No. VII.)

In so holding, the Court exceeded its jurisdiction by substituting its judgment for that of the Commission on a question of fact.

2. The District Court erred in concluding—

That the action of the defendant carriers in publishing tariffs on shortened notice, not authorized by Ex Parte 162 referred to in the Findings herein, was illegal and void. That accordingly the defendant carriers were not entitled either to exact the 20% increase or the 6-cent maximum permitted under Ex Parte 162. That the rates which were in effect im-

mediately before the initiation of the proceedings by the defendant railroads for the purpose of obtaining an increase in the rates were the legal rates applicable to these shipments here in question at the time they were made, and that all rates applied to plaintiffs' shipments and all sums of money exacted from plaintiffs by applying such freight rates to the extent of the excess of such rates over said prior existing approved rates are and were illegal and void and without legal right, since said rates were not authorized by law nor promulgated in the manner provided by law nor in the manner specifically and expressly conditioned by the Interstate Commerce Commission. (Conclusion of Law No. II.)

3. The District Court erred in concluding—

That the Interstate Commerce Commission violated its own rules and as a result thereof denied the plaintiffs due process by granting a second petition of the railroads for reconsideration as more particularly set forth in its Order of June 21, 1954. (Conclusion of Law No. IV.)

4. The District Court erred in concluding—

That the plaintiffs are entitled to judgment against the defendants, and each of them directing that the orders heretofore made by the Interstate Commerce Commission be reversed and that these causes above-captioned be remanded to the Interstate Commerce Commission for the fixing of the amount of reparations due the plaintiffs, together with interest thereon, and the entry of a reparations order

consistent with the findings of fact, conclusions of law and judgment herein entered. (Conclusion of Law No. V.)

5. The District Court erred in failing to sustain the Commission's orders which were based upon the conclusion that the complainants before it had failed to establish any violation of the Interstate Commerce Act for which they were entitled to reparation.
6. The District Court erred in entering judgment remanding the proceedings to the Commission for the purpose of entering a reparation order.

SUMMARY OF ARGUMENT

I

Under the Interstate Commerce Act, the Commission has continuing jurisdiction over its rate orders and may set aside an order granting reparation and reopen the proceeding for the purpose of correcting any error contained therein. The lower court's interpretation of the Commission's rule against successive petitions would deny this continuing jurisdiction contrary to the decision of the Supreme Court in *Baldwin v. Scott Milling Co.*, 307 U. S. 478.

The Commission's order of June 21, 1954, reopening the administrative proceeding for reconsideration was based upon a "change in circumstances" and, therefore, did not violate the Rule of Practice prohibiting successive petitions. The "change in circumstances" was the public announcement in another case of the abandonment of the novel "unjust enrichment"

theory first devised in the proceeding under review in this Court.

The rule against successive petitions is one of reason and the Commission's interpretation thereof should not be disturbed except upon the clearest showing of abuse of discretion.

II

In determining the applicability (legality) of a rate under Section 6 of the Interstate Commerce Act as distinguished from its reasonableness, etc. (lawfulness), equitable principles are not considered. Under that Act the initiation of rates is left with the carriers and a rate published in a tariff and not rejected or suspended but accepted for filing by the Commission becomes, upon the effective date shown therein, the *applicable* rate even though it violates some provision of the Interstate Commerce Act or some order of the Commission. This rule is of long standing and is in harmony with the purpose of the Act which is to have but one rate open to all alike and from which there can be no departure. Under the rule, a shipper may take the tariff at its face value and is not required to look beyond the tariff to determine whether it conforms to all provisions of the Act and to all pertinent orders of the Commission. If rates are to be declared illegal (inapplicable) because the tariff fails to provide thirty days' notice of their effective date and because they do not conform to outstanding orders of the Commission, shippers will be charged

with knowledge which they do not, and frequently cannot, possess.

Even the Division which would have granted reparation to appellees did not propose to do so as an exception to this rule.

III

Section 9 of the Interstate Commerce Act allows a party complaining of a violation of the Act by a carrier to file a complaint with the Commission, or in some instances with the court, but he cannot pursue both remedies. Since appellees sought their relief from the Commission, it is important here that the court action be limited to a review of the Commission action, even on the question of applicability, and not become, in effect, a hearing *de novo*. Otherwise Section 9 is without a purpose.

The evidence reveals a rational basis for the Commission's conclusion that the charges paid by appellees were within the zone of reasonableness. In its original report in this case the Commission, contrary to its long-standing view, as well as to the ruling of the Supreme Court in *Great Northern Railway v. Sullivan*, 294 U. S. 458, undertook under the unprecedented "unjust enrichment" theory to find that a portion of the total charge was unjust, in violation of Section 1 (5). Upon further reflection, it withdrew from this position and proceeded to evaluate the total charge paid by appellees. It found that the total charge was not unreasonable.

The question of undue preference and prejudice under Section 3 (1) is one of fact for determination

by the administrative body and not by the court. The lower court violated that fundamental rule, as well as the purpose of Section 9 of the Act, by finding as a fact that the increases in rates damaged appellees by causing a loss of market.

The evidence of record failed to establish to the Commission's satisfaction any undue preference or prejudice, much less that damages were suffered by appellees. In fact the evidence indicates just the contrary. For example, the witness who testified in support of the Section 3 allegation admitted that his company in 1947—the year involved here—increased its production over 1946 by 50,000 bales and disposed of all but about 10,000 bales.

Even the Division of the Commission which originally voted to grant reparation to appellees was of the view, that this record would not support a finding of undue preference and prejudice.

ARGUMENT

I

The order of June 21, 1954, reopening the administrative proceeding for reconsideration was a valid exercise of power specifically granted to the Interstate Commerce Commission and did not violate its Rules of Practice

On December 30, 1953, the Commission issued what ordinarily would have been its final order in the administrative proceeding. The order set forth the amount of money damages to which the Commission had found appellees were due under its unprecedented unjust enrichment theory. The carriers were di-

rected by the order to pay the amounts specified therein by February 19, 1954.

However, in its report and order of February 11, 1954, in the *Bolgiano* case, 291 I. C. C. 659, the Commission on reconsideration of the "unjust enrichment" theory, which it had also applied in that case, reverted to its prior view that in considering the reasonableness of a rate under Section 1 (5) of the Act, the entire rate, that is, the total charge, must be considered. A petition for reconsideration of that order was denied by order dated June 7, 1954.

The carriers here involved, upon learning that the Commission had repudiated its novel theory of "unjust enrichment," immediately filed their petition dated March 2, 1954, for leave to file a petition for reconsideration of their case. This petition was specifically based upon "this change in circumstances" (R. 370). Appellees opposed the petition but the Commission, on June 21, after denying *Bolgiano's* petition for reconsideration on June 6, in the other case, granted the petition of the railroads for leave to file and allowed the filing of their petition for reconsideration.

The lower court held that the Commission's order of June 21, 1954, violated its own Rules of Practice, and thereby denied appellees due process (R. 35). In so ruling the court overlooked the specific provisions of the Interstate Commerce Act which give the Commission continuing jurisdiction over its reparation orders and misconstrued the Commission's rules of practice.

Section 16 (6) provides that the Commission may suspend or modify its orders upon such notice and in such manner as it shall deem proper, and Section 17 (6) provides, among other things, that after a decision of the Commission any party may at any time subject to such limitations as the Commission may establish, apply for reconsideration; that reconsideration may be granted if sufficient reason therefore be made to appear; and that such applications shall be governed by such general rules as the Commission may establish.

Under this statutory authority the Supreme Court has held that an order granting reparations may be reconsidered and reversed by the Commission years later, despite strong equitable considerations against reconsideration. *Baldwin v. Scott Milling Co.*, 307 U. S. 478. In that case the Commission had entered a reparation order which the carriers had complied with in 1929. Two years later, the Commission reopened the proceeding, and after further hearing entered its order dated July 3, 1933, reversing its earlier determination that reparations were due. The shipper refused to reimburse the carrier and was upheld in its position when the latter brought suit in the State court. However, the United States Supreme Court held that the carrier was entitled to recover even though the shipper had paid half of the amount received to an expert who represented it before the Interstate Commerce Commission. In its

discussion of the Commission's continuing jurisdiction over orders the Court stated (pp. 483-485):

"But by § 16a, [footnote omitted] [now Sec. 17 (6)] the Commission was empowered to set aside its orders. That section was drafted by the Commission at the request of the Senate Committee on Interstate Commerce and was added by the Hepburn Act of 1906. It was 'a new section * * * which expressly authorized the commission to review and modify its own decisions.' [footnote omitted] It was expounded by the Commission as 'intended to give the commission a right to rehear a matter for the purpose of correcting any injustice in a previous order.' *Cattle Raisers' Assn. v. Missouri, K. & T. Ry. Co.*, 12 I. C. C. 1, 3. While careful to prevent applications for rehearing from being used to avoid or delay compliance with the commission's orders, it empowers the commission at any time to grant rehearings as to any decision, order, or requirement and to reverse, change, or modify the same. Respondent made its demand and collected the money subject to the authority of the commission to set aside the order which authorized payment of the same.

"The clauses of § 16a that authorize the commission to consider facts arising after the former hearing and that make its decisions after rehearing subject to the same provisions as an original order manifest the purpose of the Act to require carriers to serve for, and the shippers to pay, the lawful tariff rates. The Act condemns every deviation from lawful tariff rates. It declares that no carrier may

lawfully collect a greater or less or different compensation for transportation than the rates specified in the tariff filed nor refund or remit any portion of the rates so specified. § 6 (7); see also § 10 (2). Similarly, it condemns the obtaining of transportation for less than the legally established rate. See § 10 (3) and (4). Involuntary rebates as well as those that are voluntary are prohibited. [Citing cases.] By accepting delivery of the coal, respondent became bound to pay the tariff charges. As the commission has found them not unreasonable but lawful, respondent is without right to retain the amount it collected upon the claim that they were excessive.

“The retention by respondent of money collected under the findings and order that the Commission later set aside and vacated clearly would be repugnant to the policy and provisions of the Act.”

The lower court's erroneous view of the meaning of the Commission's rule against successive petitions would deprive the Commission of this continuing jurisdiction over its orders. That rule provides:

“(f) *Successive petitions on same grounds, not entertained.*—A successive petition under subdivision (d) [reconsideration] of this rule filed by the same party or parties, and upon substantially the same grounds as a former petition, which has been considered and denied by the entire Commission, or by an appropriate appellate division, will not be entertained.”

The rule is obviously one of reason and whether or not a petition is based upon “substantially the

same grounds as a former petition" should be for the Commission to determine. The Commission's interpretation "of its rules or regulations is of controlling weight unless plainly erroneous or inconsistent." *Greene v. Dietz*, 143 F. Supp. 464, 470. On the closely related question of whether the Commission will entertain an original petition for reconsideration or rehearing, the courts have repeatedly held that question to be for the Commission and not for the courts, and that only the clearest showing of abuse of that discretion should sustain an exception to the rule. Thus in *Interstate Commerce Commission v. Jersey City*, 322 U. S. 503 at 517, the Supreme Court stated:

The rule that petitions for hearing before administrative bodies are addressed to their own discretion is uniformly accepted and seems to be almost universally applied in other Federal agencies.

And at page 514 the Court stated:

It has been almost a rule of necessity that rehearings were not matters of right but were pleas to discretion. And likewise it has been considered that the discretion to be invoked was that of the body making the order and not that of a reviewing body.

Also see *U. S. v. Pierce Auto Lines*, 327 U. S. 315 at 336.

Where the Commission is convinced that its action has been in error, simple justice and common sense require that it act to correct such error rather than wait for the courts to correct it. Thus in *Shein v. United States*, 102 F. Supp. 320, affirmed 343 U. S.

944, where the plaintiff argued that the Commission had erred in denying an application after first approving it, the Court said, p. 323:

The very nature of our American practice has been that an aggrieved party may always have opportunity to say, "you made a mistake." If upon deeper research, fuller reflection and consideration the judicial or quasi-judicial body would see a mistake but persist in it, this would amount to mere obstinacy or stubbornness and foster the highest form of injustice.

This view was expressed by Chief Judge Parker of the Fourth Circuit in the matter of *Beard-Laney, Inc. v. United States*, D. C., 83 F. Supp. 27, at page 33 where he said: "The rules to be applied in reviewing the order of the Commission are not different because that order resulted from a reversal of a prior decision of the hearing division upon a petition for rehearing. The fact that a rehearing was granted shows that the questions involved were carefully considered and the ultimate decision of the division, which received the approval of the Commission, was the final and definitive action of the Commission, which is what we are authorized to review; and it is to be reviewed in the same way and under the same limitations as other reviewable orders. We may not substitute our judgment for that of the Commission because upon a rehearing and fuller consideration of the facts it has arrived at a different conclusion from that which its hearing division had first expressed."

In the present case, the carrier's petition of March 2, 1954, was based upon "this change in circum-

stances"—the Commission's ruling in the *Bolghiano* case. The "change in circumstances" was adequate reason for granting the petition.

II

A rate published in a tariff and accepted for filing by the Interstate Commerce Commission is the legal (applicable) rate even though it violates some provision of the Interstate Commerce Act or some order issued by the Commission

Under the Interstate Commerce Act, the right to initiate rates is left with the carrier. Under that Act, the carrier publishes the tariff and submits it to the Commission for filing (Sec. 6 (1)). The Commission may reject (Sec. 6 (6) and (9)) the new tariff if the tariff fails to give lawful notice of its effective date (30 days, which the Commission may waive) (Sec. 6 (3)), or the Commission may suspend the new tariff either upon complaint or upon its own motion for a maximum period of seven months, and enter into an investigation of the lawfulness of the rates contained therein (Sec. 15 (7)). If the Commission files the tariff and does not reject or suspend, the rates contained therein become the *legal* rates which the carrier must charge and the shipper must pay, notwithstanding the possibility that the rates may violate some other provision of the Act, such as being unreasonable under Section 1, or discriminatory under Section 3. Equitable considerations (lawfulness of the rate) are left for consideration under those other sections of the Act. *Penna. R. R. Co. v. International Coal Co.*, 230 U. S. 184, 197.

The above-described method of making rates effective has its weakness in situations where the carriers

desire to change a large group of rates as, for example, in the *General Increase* cases. If the tariffs containing such broad changes were submitted to the Commission for filing, they would in all probability be suspended, thereby bringing on hearings which would undoubtedly result in modification of the proposals of the carriers, with resulting expense and confusion in withdrawing the original tariffs and making the necessary changes.

By reason of this situation, the custom has grown up of entertaining petitions of the carriers which indicate in a general way the increases they propose to make. The Commission, usually after formal hearings, issues its report indicating what action, if any, the carriers may reasonably take to obtain more revenue. In such a proceeding, the Commission does not determine the lawfulness of a particular rate, nor does it prescribe any particular rate. The purpose of such a proceeding is to ascertain in advance of the filing of the tariffs just what increases, if any, the Commission will allow to become effective without suspension. *Algoma Coal & Coke Co. v. U. S.*, 11 F. Supp. 487.

In *Ex Parte* No. 162, the *General Increase* case, *supra*, 266 I. C. C. 537, the basic administrative proceeding involved in this appeal, the Commission determined what increases it would allow to become effective on six days' notice without suspension. The general increase was to be 20 percent, with certain exceptions. Thus, on fertilizer the increase was to be 20 percent, subject to a maximum of six cents per

hundred pounds, or \$1.20 per ton. In some instances the rates on peat are published under the fertilizer group and in others as specific commodity rates.⁶ In publishing the increases the carriers showed a maximum of six cents per hundred pounds, or \$1.20 per ton, on peat when that commodity was listed under the fertilizer group, but showed the full 20 percent increase when that commodity was not listed under the fertilizer grouping. The Commission accepted and filed the new tariffs. Since the Commission did not reject or suspend any part of these new tariffs, the rates contained therein became the *legal* rates, binding alike on carrier and shipper even though, as the Commission states, it had not intended

⁶ The distinction between class and commodity rates is explained in *New York v. United States*, 331 U. S. 284, 290, footnotes 2 and 3, as follows:

"2. The *class rates* are in the form of a schedule which shows the price per 100 pounds for moving first-class freight every possible distance it may be moved. The cost of shipment for a given commodity is determined by ascertaining its classification rating, the first-class rate per 100 pounds for the haul involved, and the percentage of the first-class rate to which the classification rating in question is subject. See 262 I. C. C., pp. 515-519.

"3. There are three other kinds of rates:

"*Exception* rates are rates resulting from the transfer of a commodity out of its regularly assigned class in the classification and into another class.

"*Commodity* rates are special rates established for particular commodities. For purposes of these rates a commodity is not given a classification rating; the result is that the commodity rates have no fixed percentage relationships to first-class rates.

"*Column* rates are fixed as definite percentages of first-class rates but like commodity rates they apply only to particular commodities and are assigned no regular class."

See 262 I. C. C., p. 562.

for the railroads to publish the full 20 percent increase on peat (R. 326-327).

The rule that a rate published in a tariff and accepted for filing by the Commission is the *legal* rate even though it violates some provision of the Interstate Commerce Act, or some order of the Commission, is of long standing and is based upon sound reasons. Since the creation of the Interstate Commerce Commission, simplicity, clarity, and certainty in both tariff publication and tariff interpretation have been among the prized objectives that Congress, the courts, and the Commission itself have striven to achieve.

Section 6 (7) of the Act provides that carriers shall collect the rates "which are specified in the tariff filed and in effect at the time." Pursuant to that language, and in the interest of certainty and clarity in tariff interpretation questions, the Commission has held that there can be no departure from the published tariff in determining questions of applicability under section 6. These decisions have been squarely in line with the statement by the Supreme Court in *Louisville & N. R. Co. v. Maxwell*, 237 U. S. 94, at page 98, that: "It was the purpose of the act to have but one rate, open to all alike and from which there could be no departure."

It frequently happens that shippers make commitments or contracts for the delivery of commercial goods based upon reduced freight rates voluntarily published by the carrier without the prior approval of the Commission. If rates contained in tariffs pub-

lished and filed with the Commission are illegal or void because they fail to provide proper notice, or because they do not conform to an order of the Commission, then the shipper can no longer rely upon the rate *specified in the tariff*; he must look beyond the tariff to determine the applicability or legality of his rate. In this connection, it should be emphasized that if a reduced rate on past shipments is found void or inapplicable for any reason, the duty rests upon the carriers to collect, by court action if necessary, the higher pre-existing applicable rate. As to past shipments, the shipper generally would have no recourse because rates voluntarily reduced by the carriers usually are below maximum reasonable rates within the meaning of Section 1 of the Act.

Tariff irregularities frequently are discovered after considerable tonnage has moved under rates contained in tariffs that have been received for filing with the Commission. These irregularities range from failure to comply with Commission orders and tariff publishing rules to the failure to conform to the requirements of lawfulness within the meaning of Sections 1, and 3 as well as other sections of the Act dealing with rates. Throughout the life of the Act, one of the basic principles that has been applied by the courts and this Commission is that the shipper, as well as the carrier, is charged with full knowledge of the legal or applicable rate within the meaning of Section 6. *Louis. & Nash. R. R. Co. v. Maxwell*, 237 U. S. 94, 97.

If rates are to be declared illegal or inapplicable because the tariff fails to provide proper notice, or

because they do not conform to outstanding orders of the Commission, then the shipper would be charged with knowledge which he does not, and frequently could not, possess. This is true, first, because the average shipper does not have reports and orders of the Commission from which he could determine whether a particular rate conformed to the requirements of an order dealing with given rate adjustments, assuming that he was qualified to interpret the order; second, the question of whether a particular tariff is published on statutory notice or any shorter notice that might be authorized by the Commission depends entirely upon when the tariff was received and filed by the Commission. The shipper of course has no way of knowing when a given tariff was received by the Commission for filing. And, third, the average shipper has no knowledge of the terms of short notice authority authorized by the Commission in particular situations.

Even the division which attempted to give the appellees some relief did not propose to do so as an exception to this rule. Thus, with regard to appellees' contention that the rates assailed were not applicable, it stated (R. 326):

Complainant's contention that the rates assailed were not applicable has no merit Where tariffs are tendered to and accepted by the Commission, the rates therein become applicable, even though technically they should have been rejected upon tender. [Citing case.] In *Kansas City Fuel Oil Co. v. Atchison, T. & S. F. Ry. Co.*, 210 I. C. C. 134, Division 3 said,

at page 136: "A rate published in a tariff on file with the Commission even though in contravention of its order would still be the legal rate."

Another Commission case practically on all fours with the present one is *Greene Cananea Copper Co. v. C., R. I. & P. Ry. Co.*, 88 I. C. C. 225 (1924), where the Commission held that a rate published on less than 30 days' notice without prior approval was nonetheless the *applicable* rate. There the Commission in a "revenue" proceeding had authorized the carriers to make certain percentage increases effective on five days' notice, but did not include increases on certain types of shipments to Mexico. The new tariffs published on five days' notice also contained increases on those types of shipments. The Commission stated:

Complainant's case rests solely on the question *whether the rates* named in supplement No. 4 to Agent Countiss' I. C. C. No. 1077, issued August 18, 1920, to become effective August 26, 1920, *were lawfully established*. By this supplement defendants provided for an increase of $33\frac{1}{3}$ percent in the rates named in No. 1077, applicable, among others, from points in the United States to Cananea, Mexico, which action purported to be in accordance with the special permission granted by us in *Increased Rates*, 1920, 58 I. C. C. 220. *No such authority was granted*. Therefore, in making the increases in question effective upon less than statutory notice, defendants failed to observe the provisions of section 6 of the interstate commerce act, *but as we accepted supplement No. 4 for filing*,

the rates named therein became the only lawful rates which could have been applied on the traffic in question.⁷ [Emphasis supplied.]

The United States Supreme Court has followed the same rule. *Davis v. Portland Seed Co.*, 264 U. S. 403 (1923), involved actions brought by shippers to recover alleged overcharges demanded by the carriers in violation of Section 4 of the Interstate Commerce Act. That section, speaking generally, prohibits without prior Commission approval, a greater charge for transportation for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance. In one case, cited by the Court as typical, the facts showed that the carrier had published and filed without prior Commission approval rates on alfalfa seed which were lower from Pecos, Texas, to Walla Walla, Washington, than from the intermediate point of Roswell, New Mexico. The shipper at Roswell claimed that the lower rate from Pecos became the maximum that could be charged from Roswell under Section 4. In ruling against the shippers' contention the Court stated at page 415:

Relying on *Pennsylvania R. R. Co. v. International Coal Co.*, 230 U. S. 184, the Interstate

⁷ Other Commission cases in point are *Bacon Bros. v. Alabama G. S. R. Co.*, 263 I. C. C. 587, 590 (1945); *Chase & Co., Inc., v. Atlantic C. L. R. Co.*, 220 I. C. C. 398, 400 (1937); *Dewey Portland Cement Co. v. Atchison T. & S. F. Ry. Co.*, 185 I. C. C. 233 (1932); *Ralston Purina Co. v. Atlanta B. & C. R. Co.*, 174 I. C. C. 722 (1931); *Concrete Engineering Co. v. Baltimore & O. R. Co.*, 160 I. C. C. 675 (1930); *Southern Trans. Co. v. Norfolk & W. Ry. Co.*, 147 I. C. C. 29, 36 (1928); *Brown & Sons Lbr. Co. v. Louisville & N. R. Co.*, 37 I. C. C. 507 (1915).

Commerce Commission has definitely rejected respondents' theory by many opinions, and holds that while a charge prohibited by the long and short haul clause, § 4, may subject the carrier to prosecution by the Government it does not afford adequate basis for reparation where there is no other proof of pecuniary damage. * * *

And at page 425:

The statute requires rigid observance of the tariff, without regard to the inherent lawfulness of the rates specified. It commanded adherence to the published rate from Roswell; § 6 forbade any other charge. Observance of the lower rate from Pecos, put in without authorization, might have been forbidden, as pointed out in *United States v. Louisville & Nashville R. R. Co.*, *supra*; but it would be going too far to hold, as respondent insists, that the unauthorized publication established the lower rate as the maximum permissible charge from the intermediate point—the only rate therefrom which could be demanded.

Also in that decision, at page 424, the Court refers to the Commission's view that a schedule (tariff) containing a plain clerical error must be observed, and that any higher charge collected may be recovered by the shipper.⁸

⁸ In his text, Freight Rate Application (1948) Glenn L. Shinn states (p. 42) :

"An error in tariff publication affords no legal ground for a departure from the applicable tariff provisions. For instance, in a case where due to an error in the publication of the tariff the figures 7 and 1 were transposed with the result that a rate of

In the only case⁹ upon which appellees have relied in support of their position, the Supreme Court of Minnesota did not refer to the above-cited view of the Commission, and in reaching its conclusion misread the above-quoted language in the *Davis* case.

There the railroad had made an error in the publication of a rate in one of its tariffs. One of the rates shown therein was stated in writing as twelve and one-half cents, and in figures as 16½ cents. The carrier sought and was granted permission to correct the tariff on short notice—the Commission's order containing the statement that the carrier's application was denied "insofar as it requests further relief." In making the correction on short notice another error was made. A rate formerly shown as 17.5 cents appeared in the reissued tariff as 1.5 cents. Several carloads of grain moved during the period the 1.5-cent rate was shown in the tariff, the railroad collected charges based upon that rate, and later

17.5 cents was published instead of the intended rate of 71.5 cents, the Commission found that the erroneously published rate of 17.5 cents was available as an intermediate factor in determining the applicable through rate; and concerning defendants' contention that complainant's claim was inequitable, the Commission said that the determination of any applicable rate is not affected by the equities of the complaint. [Citing *Stein Co. v. Gulf, C. & S. F. Ry. Co.*, 153 I. C. C. 185.] This rule, it should be explained, is uniformly applied irrespective of whether the resulting rate violates provisions of the Act or outstanding orders of the Commission. This is in accord with the statement by the Supreme Court that the statute requires rigid observance of the tariff without regard to the inherent lawfulness of the rate specified. [Citing *Davis v. Portland Seed Co.*, 264 U. S. 403, 425.]"

⁹ *Illinois Cent. R. Co. v. Van Dusen, Harrington Co.*, 212 N. W., 940 (1927).

sued the shipper for the balance claimed due under the 17.5-cent rate. The State Court allowed the railroad to recover on the theory that the 1.5-cent rate never became effective because published in violation of the Commission's order, and on less than 30 days' notice in violation of Section 6. In its opinion the Court relied upon the *Davis* case, *supra*, among others, and on a later Commission order which indicated that the applicable rate was not the 1.5-cent rate but rather a class rate which was even higher than 17.5 cents.¹⁰

In relying upon the *Davis* case the Minnesota Court quoted a statement out of context, and misread the holding. As shown above, the Supreme Court in the *Davis* case followed the Commission's interpretation of the statute, and held that the publication of the lower rate for the longer haul, in violation of Section 4, did not affect the *applicability* of the higher rate published and filed for application at the intermediate point. The shipper was arguing that the lower rate published for application at the further point (Pecos) became the maximum which the carrier could charge from the intermediate point (Roswell) notwithstanding the higher published rate therefrom, and that the sum charged the shipper at the inter-

¹⁰ The order made "at the instance of the carriers" was merely a permissive order issued to allow the carriers to adjust their charges without the filing of special docket applications. It was not the result of any formal docket in which an issue was joined concerning the applicability of a rate on the shipments concerned. Moreover, the rate involved there was clearly ambiguous on its face.

mediate point was an illegal exaction to the extent it exceeded the lower rate, recoverable without proof of damage and without regard to the intrinsic reasonableness of either rate. (264 U. S. at 415.) The language quoted by the State Court that it "would be going too far to hold * * * that the unauthorized publication established the lower rate as the maximum permissible charge" has reference to the attempted application of the lower rate at the intermediate point of Roswell for which a higher rate was published. The lower rate was the *applicable* rate from the farther point of Pecos, and the higher rate was the *applicable* rate from the intermediate point of Roswell, although published in violation of Section 4.

III

Under the established rules for judicial review of Commission orders the district court erred in failing to find that the Commission's orders of October 4, 1954, and January 3, 1955, dismissing the complaints were based upon adequate findings which in turn were supported by substantial evidence on the record considered as a whole

While the Commission proceeding dealt with the question of rates for the future as well as reparation on past shipments, the Court action as heretofore pointed out (p. 5) is concerned only with the reparation question.

Under Section 9 of the Interstate Commerce Act, a person complaining of a violation of the Act by a common carrier, may either file a complaint with the Commission or, in certain cases, go into court in the first instance, but can not pursue both remedies. Having in this case sought relief from the Commis-

sion it seems clear that prior to *United States v. Interstate Commerce Commission*, 337 U. S. 426, appellant could not have maintained this court action. But in that case the Supreme Court held that Section 9's prohibition extended only to the *initiation* of an action for damages in court after resort to the Commission had been in vain, 337 U. S., at 432-440.

The Supreme Court did not state what the scope of review should be (see the dissenting opinion at pages 457-458), but later when the order involved in that case was before the Court of Appeals for the District of Columbia circuit for review, that Court stated that it would apply the standards of review generally applicable to administrative action. *United States v. Interstate Commerce Commission*, 198 F. 2d 958, at 963-64, cert. denied, 344 U. S. 893. The same rule has been followed in this circuit. *Interstate Commerce Commission v. Martin Brothers Box Co.*, 219 F. 2d 811, cert. den. 350 U. S. 823.

It is well settled that an order of the Commission is subject only to limited review in the courts and that the proceeding upon which the order is based is not to be heard and decided *de novo*. Thus the court does not hear new evidence not presented to the Commission, *Sakis v. United States*, 103 F. Supp. 292, 313, or decide such factual questions as to whether the assailed rates were unreasonable or prejudicial, *Interstate Commerce Commission v. Martin Brothers Box Co.*, *supra*. If the court determines that the Commission made findings sufficient to indicate the basis for its conclusions, that such findings have sub-

stantial support in the record and that the Commission has not misapplied the law, the power of review is exhausted.

* * * Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. * * *

* * * * *

* * * Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question. * * *

[*Rochester Tel. Corp. v. United States*, 307 U. S. 125, 139-140, and 146.]

So long as there is warrant in the record for the judgment of the expert body it must stand. * * * "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body" * * *

[*Interstate Commerce Commission v. Jersey City*, 322 U. S. 503, 513.]

The findings necessary in a Commission report of the type hereunder review need not be set out with formality nor expressed in terms which courts generally employ. The law is satisfied if "the report, read as a whole, sufficiently expresses the conclusion of the Commission based upon supporting data." *Alabama*

Great Southern R. Co. v. United States, 340 U. S. 216, 227-228.

Ordinarily, the Commission's conclusions of law, such as the determination of tariff applicability under Section 6 (discussed in the preceding chapter of this brief), do not have the same claim to finality as do findings of fact. However, the courts do and should give great weight to such conclusions. *Levinson v. Spector Motor Company*, 330 U. S. 649, 672, *Medo Corp. v. Labor Board*, 321 U. S. 678, 681, and footnote thereon and *United States v. American Trucking Ass'n*, 310 U. S. 534, 549. Those interpretations should be upheld unless they are clearly wrong. In other words, the question for the Court should be whether there is room on the record for the Commission's determination or, stated otherwise, whether there is a rational basis for the Commission's conclusion. Compare *Gray v. Powell*, 314 U. S. 402, 411-414, *Rochester Tel. Corp. v. United States*, 307 U. S. 125, 136, 139, 146, and *Shields v. Utah-Idaho R. Co.*, 305 U. S. 177, 181, and 184. To ignore the Commission's conclusion in a reparation case such as this and to reach a contrary conclusion upon an independent examination of the tariffs and statutes involved would, in effect, be granting a remedy which Section 9 of the Interstate Commerce Act prohibits. To prevent appellees from getting "two bites at the cherry" in violation of Section 9, it is essential that the Court proceeding be limited strictly to a review of the Commission's action and not become in effect a new trial.

With these rules in mind we turn to an examination of the Commission's report and order of October 4, 1954, and its order of January 5, 1955, denying repatriation. The report is a part of the order. *Georgia Commission v. United States*, 283 U. S. 765, 771. In the report the Commission concluded that the assailed rates were applicable and had not been shown to be unjust, unreasonable, or otherwise unlawful (R. 386-387). In the preceding chapter of this brief we have discussed the question of *applicability* and will therefore limit our discussion here to the questions of *reasonableness* under Section 1 (5) and of *undue preference and prejudice* under section 3 (1).

A. The assailed rates were not shown to be unreasonable.

The evidence concerning the reasonableness of the rates as increased upon appellees' shipments is summarized in the Report of the Commission on Reconsideration and will not be repeated in detail here (R. 380-386). Briefly the Commission considered the origin, nature and purpose of the product, its transportation characteristics, its value, the volume of traffic involved, where it moved, the history of the rates thereon to western points in the United States, including the different rates to points in California, and the car-mile revenue yields of those rates to various points.

The Commission concluded that this evidence was not sufficient to show that the rates as increased (the total charge) were unreasonably high. Indeed, the evidence indicates that the assailed rates were well within the zone of reasonableness. For example, the

Commission compared the rates as increased to San Francisco and Los Angeles of 70 cents and 86 cents with rates of 88 cents and \$1.10 to the same points which became effective in March 1938, pursuant to another *General Increase* case. A railroad witness also developed the fact that the basic rates had been voluntarily established originally on an extremely low level to permit these appellees to reach mid-western and eastern markets (R. 256-258).

We do not understand appellees to seriously urge that the total rate was too high. Their contention was that the *increase* was beyond what the Commission had found to be reasonable and, therefore, they were entitled to reparation. Furthermore, it is interesting to note that the report of the Division favorable to appellees did not find the *rates* as increased to be unreasonable. Thus in answer to the carriers' effort to establish that the whole rate (the basic rate plus the increase of 20 percent) was reasonable, the Division stated that such evidence "misses the crux of the issue here presented" (R. 328) that the reasonableness of the *increase* had been determined in the *General Increase* case, that the carriers had no right to publish any greater increase without further proceedings before the Commission and that to allow the carriers to retain the amount of increase above what had been authorized would result in their "unjust enrichment." While the reasonableness of the *increase* was determined in the *General Increase* case,

the reasonableness of the rate as increased (the total charge) was not determined.¹¹

In determining the lawfulness of a rate under Section 1 of the Act, the Commission has long held that the total charge and not just some component of the rate must be considered. An excellent discussion of this subject is contained in the dissenting opinion of Commissioner Elliott (later followed by the entire Commission in this case) in the first *Bolgiano* case, 289 I. C. C. 169. That case involved the same rate adjustment and the same legal principle as is involved in this case. That case followed this one in point of time and the Division by a majority vote agreed that the shipper was entitled to reparation under the "unjust enrichment" theory originally propounded in the case now before this Court.

There Commissioner Elliott shows that the Commission had ruled that the total through charges from origin to destination must be considered when a complainant is claiming damage by reason of the exac-

¹¹ In a *General Increase* case, the Commission does not, indeed as a practical matter it cannot, determine the reasonableness of any particular rate under Section 1. In fact it specifically disclaims any intention of so determining. Thus, in Ex Parte No. 162, *Increased Railway Rates, Fares, and Charges, 1946*, in finding No. 15, the Commission stated, 266 I. C. C. at 617:

"15. Rates and charges increased as herein permitted are not considered as prescribed rates within the meaning of *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U. S. 370."

That finding leaves the question of lawfulness of the individual rates and any question of reparation open for determination in an appropriate proceeding. See *Algoma Coal & Coke v. United States*, 11 F. Supp. 487, 493.

tion of unlawful components of through rates; that the Supreme Court has stated that the shipper's only interest is that the charge shall be reasonable as a whole;¹² that the Commission had ruled that in determining whether reparation was due consideration must be given to the total charge resulting from the basic rate plus the increase. The Commissioner then summarizes the holdings of the many cases he cites as follows (p. 173):

Whatever else may have been decided in all of the foregoing cases, I think it must be admitted that where there is an issue as to reparation on past shipments the Commission has repeatedly and consistently held that in the determination of the reasonableness of rates which are composed of more than one element the *total charges*, whether they be combination rates or a basic rate plus some part of a general increase, must be considered.

Since in our case the shippers have not shown that they have paid an unreasonably high *total charge*, they cannot recover reparation. And the law does not permit the Commission to assess a penalty against the carriers for violation of the Act or of some Commission order. Only the courts may do that in an appropriate proceeding. As the Supreme Court stated in *Pennsylvania R. Co. v. International Coal Co.*, 230 U. S. 184, at 199-200:

There were many provisions in the statute for imprisonment and fines. On the civil side

¹² "The shipper's only interest is that the charge shall be reasonable as a whole." *Great Northern Ry. Co. v. Sullivan*, 294 U. S. 458, 463.

the Act provided for compensation—not punishment. Though the Act has been held to be in many respects highly penal, yet there was no fixed measure of damage in favor of the plaintiff. But, as said in *Parsons v. Chicago & N. W. Railway*, 167 U. S. 447, 460, construing this section (8) “before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.” Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what though called damages would really be a penalty, in addition to the penalty payable to the Government. On the contrary, and in answer to the argument that damages might be a cover for rebates, the act of June 18, 1910 (36 Stat. 539 c. 309), provided that where a carrier misquotes a rate it should pay a penalty of \$250, not to the shipper, but to the Government, recoverable by a civil action brought by the United States. 35 Stat. 166. Congressional Record (1910) 7569. The danger that payment of damages for violations of the law might be used as a means of paying rebates under the name of damages is also pointed out by the Commission in 12 I. C. C. 418–421, 423; 14 I. C. C. 82.

And so in this case appellees seek to “recover what though called damages would really be a penalty.”

B. The assailed rates were not shown to be unduly prejudicial to appellees

Section 3 (1) provides in part:

It shall be unlawful for any common carrier subject to the provisions of this part to make,

give or cause any undue or unreasonable preference or advantage to any particular * * * corporation * * * locality * * * in any respect whatsoever; or to subject any particular * * * corporation * * * locality * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

To prevail under this section, a complainant must show (1) that there is preference of one shipper or locality and prejudice against another, (2) that the prejudice is undue, (3) that a carrier or group of carriers effectively participates in the rates over both routes, and (4) if reparation is sought, that the undue prejudice has caused actual damage to complainant. *Interstate Commerce Commission v. United States*, 289 U. S. 385, and *T. & P. Ry. Co. v. United States*, 289 U. S. 627, 648-650. Findings under this section are factual and if supported by substantial evidence are conclusive. *Virginian Ry. v. United States*, 272 U. S. 658, 663, and *United States v. Trucking Co.*, 310 U. S. 344, 352. As the Supreme Court stated in *Penna. R. R. Co. v. International Coal Co.*, *supra*, at p. 196:

Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service, and calls for an exercise of the discretion of the

administrative and rate-regulating body. For the reasonableness of rates, and the permissible discrimination based upon difference in condition are not matters of law. *So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts.* That power has been vested in a single body so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals. [Emphasis supplied.]

In the present case, the court below violated that fundamental and well understood rule by substituting its judgment for that of the Commission on the factual question of whether appellees had been damaged by paying the higher rates. Thus the court ruled (R. 33; Finding No. VII):

That the increase in rates damaged the plaintiffs in this case by causing a loss of market.

That finding also is contrary to the stated purpose of Section 9 of the Interstate Commerce Act, as previously pointed out at page 36 of this brief as it allows the shipper to contest the same question of fact before the Commission and before the court.

Let us examine the evidence now to determine whether there is rational basis for the Commission's conclusion that the record fails to show undue prejudice to appellees. Eleven percent of the shipments involved here moved to points east of Chicago (R. 196). Those appellees who shipped into this area claimed that the rate structure as changed unduly

preferred shippers in eastern Canada and Maine and unduly prejudiced appellees. They assumed, without attempting to show, that the rates were properly related prior to the *general increase* (R. 235) and argued from that premise that the rates as increased became improperly related. For example, the basic rate to Philadelphia was 90 cents from British Columbia and 36 cents from Maine. The 90-cent rate was increased by 20 percent to \$1.08, while the 36-cent rate was increased by only 6 cents to 42 cents (R. 185).

At about the same time of the *General Increase*, at least one of the appellees (R. 163-192) increased its price on peat by 10 cents per bale to \$1.85 (R. 167, 174, 178, 183). However, after the increase became effective it found that its price in the eastern market was about 20 percent higher than its competition and so reduced its price back to \$1.75 per bale (R. 175, 182, 191). Appellees could offer no specific evidence of the competition (R. 177, 233), but did know that they were competing in the eastern market not only with eastern peat, but also with such substitutes as "ground corncobs, sugarcane husks, sugarcane refuse, and various other competing products" (R. 173). The witness who testified in support of the alleged Section 3 violation also stated that his company increased its production by 50,000 bales in 1947 over 1946 and disposed of all but about 10,000 bales of this increase (R. 179). This testimony certainly doesn't indicate that the shipper was damaged!

The Commission found that appellees had failed to make a showing of undue prejudice (R. 381). Even

the Division which originally issued the report favorable to appellees agreed that appellees had not shown a violation of Section 3, much less that they had suffered damage. There the Division in summarizing the evidence stated (R. 330):

In support of the allegation of undue preference and prejudice, complainants assert that they ship peat to points in the United States east of Chicago in competition with producers of that commodity located at points in eastern Canada and in the eastern part of the United States; that during most of the year 1947 the full 20-percent increase was applied to their rates, whereas the rates from the alleged preferred points were increased a maximum of 6 cents; and that their prices could not be correspondingly increased. To those consuming points, the distances from the origins herein average about 3,500 miles, as compared with an average of only 1,000 miles from the alleged preferred points. Complainants encounter competition also with peat substitutes, such as sugarcane products, straw, corncobs and ground bark. The differences between the assailed and alleged preferential rates are not shown to have been or to be of a character justifying a finding that certain defendants having effective control of the rates subjected or subject complainants to undue prejudice.

As previously noted, appellees' contention is that the unequal increases on peat in and of themselves constitute a violation of some provision of the Interstate Commerce Act. It is not surprising then that their evidence would be of a general nature and not

specific enough to show violation of Section 3. They *assumed* that the basic rates were properly related and did not undertake to show otherwise. A mere showing of a difference in rates does not prove undue prejudice. As the Commission stated in *R. C. Williams and Co. v. New York Central R. Co.*, 269 I. C. C. 297, 301:

* * * It is well settled that a mere difference in rates is not sufficient to constitute undue prejudice. There is no showing of specific shipments to the alleged preferred points. Undue prejudice and preference must be established by a preponderance of evidence which must make it reasonably clear that the prejudice and preference complained of result from the rate adjustment of which complaint is made. Undue prejudice and preference may not be assumed or left to inference. Moreover, general declarations as to competition or injury unsupported by evidentiary facts, do not warrant a finding of undue prejudice. [Citing case.]

Furthermore on the question of damage, appellees' showing was concerned only with the difference in the increases. They claimed to be damaged in that amount.¹³ However, such a general showing is not sufficient proof of damages to award reparations under Section 3. In *Sand, Gravel, and Crushed Stone*, 181 I. C. C. 373, 393, the Commission stated:

* * * We have repeatedly held that undue prejudice within the meaning of the act or-

¹³ The lower court would find them damaged in a greater amount.

dinarily requires the prejudice suffered by one party to be the source of positive advantage to the one alleged to be preferred and that a competitive relationship exists between the parties concerned. In the *Woodsum* case, cited by the court, we specifically found, on evidence disclosing the rate disparity, the relative transportation conditions, and the competitive situation, that the rate there assailed was and for the future would be unduly prejudicial to the extent there indicated and required the undue prejudice to be removed. In the same case in discussing the question of reparation, we said at page 246:

“However, there is nothing of record to indicate that the price which complainants receive for their coal is fixed by their competitors or that the alleged loss of profits is the direct result of the undue prejudice herein-after found to exist. Nor is complainants’ evidence with respect to loss of business sufficiently definite to enable us to determine whether such loss was the result of the undue prejudice.

* * * For the reasons set forth above, reparation is denied.”

Neither this commission nor the Supreme Court has ever held that the evidence to establish the fact of undue prejudice and preference must be the same as is necessary to warrant an award of reparation on account of undue prejudice and preference.

Compare *Penna R. R. Co. v. International Coal Co.*, *supra* at 198, and *Interstate Commerce Commission v. United States*, *supra*, at 392-393.

It is quite evident from the above discussion that the Commission was warranted in finding upon the facts of this case that appellees had failed to make a showing of undue prejudice.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be reversed, and the case remanded with instructions that the Court enter a judgment sustaining the Commission's report and order, and that the cause be dismissed.

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APRIL 1957.

APPENDIX

APPLICABLE STATUTORY PROVISIONS AND COMMISSION RULES OF PRACTICE

INTERSTATE COMMERCE COMMISSION'S GENERAL RULES OF PRACTICE (49 CFR 1.1 ET SEQ.)

Rule 100. *Statements of claimed damages based on Commission findings.* When the Commission finds that damages are due, but that the amount cannot be ascertained upon the record before it, the complainant should immediately prepare a statement showing details of the shipments on which damages are claimed, in accordance with the form No. 5. (See appendix.) The statement should not include any shipment not covered by the Commission's findings, or any shipment on which complaint was not filed with the Commission within the statutory period. The filing of a statement will not stop the running of the statute of limitations as to shipments not covered by complaint or supplemental complaint. If the shipments moved over more than one route, a separate statement should be prepared for each route, and separately numbered, except that shipments as to which the collecting carrier is in each instance the same may be listed in a single statement if grouped according to routes. The statement, together with the paid freight bills on the shipments, or true copies thereof, should then be forwarded to the carrier which collected the charges for verification and certification as to its accuracy. If the statement is not forwarded immediately to the collecting carrier for certification, a letter request from defendants that forwarding

be expedited will be considered to the end that steps be taken to have the statement forwarded immediately. All discrepancies, duplications, or other errors in the statements should be adjusted by the parties and correct agreed statements submitted to the Commission. The certificate must be signed in ink by a general accounting officer of the carrier and should cover all of the information shown in the statement. If the carrier which collected the charges is not a defendant in the case, its certificate must be concurred in by like signature on behalf of a carrier defendant. Statements so prepared and certified shall be filed with the Commission, whereupon it will consider entry of an order awarding damages.

Rule 101. *Petitions for rehearing, reargument, or reconsideration.*—(a) *In general.*—A petition seeking any change in a decision, order, or requirement of the Commission should specify whether the prayer is for reconsideration, reargument, rehearing, further hearing, modification of effective date, vacation, suspension, or otherwise.

* * * * *

(d) *Reconsideration.* If relief under this rule other than under subdivisions (b) and (c) is sought, the matters claimed to have been erroneously decided and the alleged errors or relief sought must be specified with the particularity respecting exceptions as outlined in rule 96 (a), as should also any substitute finding or other substitute requirements desired by petitioner.

* * * * *

(f) *Successive petitions on same grounds, not entertained.*—A successive petition under subdivision (d) of this rule filed by the same party or parties, and upon substantially the same grounds as a former petition, which has been considered and denied by the entire Commission, or by an appropriate appellate division, will not be entertained.

INTERSTATE COMMERCE ACT (24 STAT. 379) AS AMENDED,
(49 U. S. C. 1 ET SEQ.)

Sec. 1. (5) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Sec. 3. (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Sec. 6. (1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep

open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

Sec. 6. (3) No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the Commission may, in its

discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further*, That the Commission is hereby authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges, or classifications not changed if, in its judgment, not inconsistent with the public interest.

Sec. 6. (6) The schedules required by this section to be filed shall be published, filed and posted in such form and manner as the Commission by regulation shall prescribe; and the Commission is authorized to reject any schedule filed with it which is not in accordance with this section and with such regulations. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

Sec. 6. (7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any

portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Sec. 6. (9) The Commission may reject and refuse to file any schedule that is tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Commission shall be void and its use shall be unlawful.

Sec. 8. That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Sec. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this part may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this part, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be

pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Sec. 15. (7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If

the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Sec. 16. (1) That if, after hearing on a complaint made as provided in section thirteen of this part, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this part for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

Sec. 16. (2) If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or

any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

SEC. 16. (6) The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

Sec. 17. (6) After a decision, order, or requirement shall have been made by the Commission, a division, an individual Commissioner, or a board, or after an order recommended by an individual Commissioner or a board shall have become the order of the Commission as provided in paragraph (5), any party thereto may at any time, subject to such limitations as may be established by the Commission as hereinafter authorized, make application for rehearing, reargument, or reconsideration of the same, or of any matter determined therein. Such applications shall be governed by such general rules as the Commission may establish. Any such application, if the decision, order, or requirement was made by the Commission, shall

be considered and acted upon by the Commission. If the decision, order, or requirement was made by a division, an individual Commissioner, or a board, such application shall be considered and acted upon by the Commission or referred to an appropriate appellate division for consideration and action. Rehearing, reargument, or reconsideration may be granted if sufficient reason therefor be made to appear; but the Commission may, from time to time, make or amend general rules or orders establishing limitations upon the right to apply for rehearing, reargument, or reconsideration of a decision, order, or requirement of the Commission or of a division so as to confine such right to proceedings, or classes of proceedings, involving issues of general transportation importance. Notwithstanding the foregoing provisions of this paragraph, any application for rehearing, reargument, or reconsideration of the matter assigned or referred to an individual Commissioner or a board, under the provisions of paragraph (2), if such application shall have been filed within twenty days after the recommended order in the proceeding shall have become the order of the Commission as provided in paragraph (5), and if such matter shall not have been reconsidered or reheard as provided in such paragraph, shall be referred to an appropriate appellate division of the Commission and such division shall reconsider the matter either upon the same record or after a further hearing.

United States Court of Appeals For the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL and PACIFIC RAILROAD
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COMPANY and NORTHERN PACIFIC RAILWAY COMPANY,
Appellants,

vs.

ALOUETTE PEAT PRODUCTS, LTD., *et al.*, *Appellees.*

INTERSTATE COMMERCE COMMISSION, *Appellant,*

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF RAILROAD APPELLANTS

B. E. LUTTERMAN

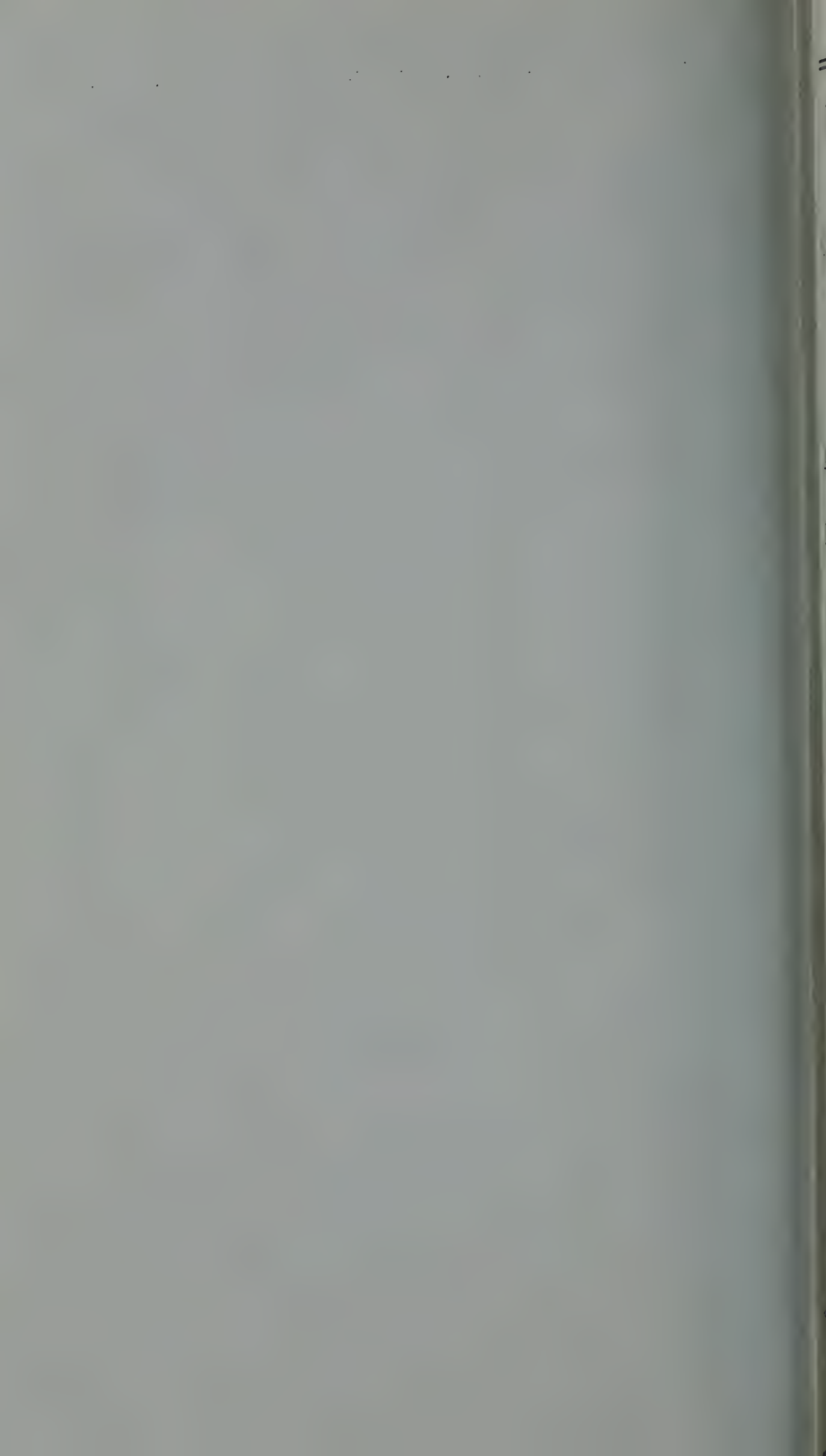
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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR
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BRIEF OF RAILROAD APPELLANTS

I. STATEMENT ON JURISDICTION

The complaints (T. 3-44 incl., and 45-49 incl.)¹ invoked the jurisdiction of the United States District Court to set aside and annul orders of the Interstate Commerce Commission (hereinafter called "Commission") entered in proceedings instituted before the Commission under Title 49 U.S.C.A. Sec. 9, for the recovery of damages alleged to have been sustained by

¹References to the printed transcript of record will be shown by the abbreviated "T." followed by the page at which the material referred to appears in the record.

the collection of railroad freight charges. The Commission's orders denied recovery and dismissed the complaints (T. 388-389).

A United States District Court composed of one judge under Title 28 U.S.C.A. Sec. 1336 (28 U.S.C. Sec. 41(28)) has jurisdiction to review an order of the Commission denying damages in proceedings before the Commission under Title 49 U.S.C.A. Sec. 9, and appeal from the judgment of the United States District Court is to the United States Court of Appeals. *United States v. Interstate Commerce Commission*, 337 U.S. 426, 93 L.ed. 1451; *United States v. Interstate Commerce Commission*, 98 F.(2d) 958.

II. STATEMENT OF THE CASE

This is an appeal from a judgment reversing orders of the Interstate Commerce Commission dismissing complaints seeking reparations of freight charges for the transportation of peat from British Columbia points to destinations in the United States.

This case has its origin in April of 1946, when substantially all of the railroads in the United States filed with the Commission petitions for authority to increase their freight charges 25 per cent. These proceedings are reported in *Ex Parte 162, Increased Railway Rates, Fares, and Charges, 1946*, 264 I.C.C. 695; report on further hearing, 266 I.C.C. 537 (hereinafter called "Ex Parte 162").

In the Commission's report on further hearing, 266 I.C.C. at 614, the Commission allowed a general increase of 20 per cent in the freight charges of railroads, with many exceptions to be noted on the subsequent

pages, 615 to 623, inclusive. Annexed to this report was an appendix defining the manner in which the increases allowed by the report and order were to be applied and which contained the following opening paragraph:

“Basic freight rates, whether class or commodity, and charges, on the commodities hereinafter specified, may be increased in the amounts and in the manner set forth as to each commodity class or group. The commodity group numbers (or commodity class numbers) used in this appendix, and throughout the entire report and order, for convenience, are those specified in the order of division 4 of November 22, 1927, *In the Matter of Freight Commodity Statistics*, which was in effect at the date of the submission herein, although a new list of commodity classes with articles assigned thereto has been promulgated by order of division 1, September 24 and October 16, 1946, to become effective January 1, 1947. They are intended generally to cover the items customarily included by the carriers in their reports to the Commission under each numbered description, as of the date for the submission.” (266 I.C.C. 537 at 618, Finding of Fact No. V, T. 31, 32)

The commodities thereafter listed in the Appendix included at page 623 the following:

“Fertilizers, N.O.S., including Potash — Group 640

Diatomaceous or Infusorial Earth—Group 701

Twenty per cent, subject to a maximum of 6 cents per 100 pounds, or \$1.20 per net ton.” (Finding of Fact No. V, T. 32)

The above mentioned commodity Group 640, “Fertilizers, N.O.S., including potash,” includes peat, ground or

unground, the commodity here considered (Exhibit No. 5).²

The carriers, in publishing the increased rates authorized in that proceeding, published a 6-cent maximum increase in rates on peat only when that commodity was carried in the tariffs in the fertilizer group. In instances where separate commodity rates were published for peat, the full 20 per cent increase was published (T. 324, 259). The increased rates were published to become effective on January 1, 1947 (T. 258). Thereafter, on different dates, the carriers by what they consider to be their voluntary act and not because of any requirement of the Commission, by several publications applying to different destinations reduced their rates on peat to a maximum increase of 6 cents per 100 pounds, the last such publication being March 29, 1948 (T. 258, 259, 260).

The appellees filed complaints³ with the Interstate Commerce Commission, seeking recovery of the charges they paid on peat shipments that exceeded the 6-cent maximum increase prescribed for fertilizers, N.O.S., in the Commission's order in Ex Parte 162 (T. 149). Division 2 of the Commission, by report and order dated April 7, 1950, reported in 277 I.C.C. 641 (T. 320

²References to Exhibits are the exhibits received by the Commission at the hearing in Docket 29974, *Acme Peat Products, Ltd., et al. v. The Akron, Canton & Youngstown Railroad Company, et al.*

³There were two proceedings before the Commission—*Acme Peat Products, Ltd., et al. v. The Akron, Canton & Youngstown Railroad Company, et al.*, Docket No. 29974, and *Alouette Peat Products, Ltd., v. The Atchison, Topeka and Santa Fe Railway Company, et al.*, Docket No. 30260. Since the two cases raised identical issues, both were submitted and decided on the record made in *Acme Peat Products, Ltd., et al., v. The Akron, Canton & Youngstown Railroad Company, et al.*, Docket No. 29974 (T. 5).

to 333, incl.), found that the assailed rates were applicable, that the railroads were not authorized by the Commission's order in *Ex Parte* 162 to increase the rates by 20 per cent, and that the appellees were entitled to damages in the amount of the difference between the rates increased by a maximum of 6 cents per 100 pounds and the 20 per cent increase which the carriers had applied, on the theory that the retention of any sums in excess of the 6-cent maximum increase found by the Division to be the only increase authorized, would unjustly enrich the carriers (T. 329, 330). The carriers were ordered to repay the appellees the amount of freight charges they had collected in excess of a maximum increase of 6 cents per 100 pounds increase in their rates (T. 331).

The defendant carriers petitioned for reconsideration by the full Commission (T. 333, 354), which was denied January 7, 1952 (T. 354, 355). In February, 1954, the Commission on reconsideration in *F. W. Bologiano & Co., Inc. v. Baltimore & O. R. Co.*, reported in 291 I.C.C. 659, a case that raised legal issues identical to the issues in this proceeding, rejected the doctrine of unjust enrichment first announced in this proceeding, *Acme Peat Products v. Akron, C. & Y. R. Co.*, 277 I.C.C. 641, and held that although the carriers may have published and filed unauthorized increases in their rates, a shipper is not entitled to recover damages unless this action of the carriers resulted in damages to the shipper by requiring payment of unreasonable charges.

In light of this change in circumstances, the defendant carriers on March 2, 1954, tendered a petition to

the Commission for leave to file a petition to reopen and reconsider the Commission's decisions in this case (T. 369, 370). Simultaneously with the filing of the petition, the carriers also tendered a petition to reopen the proceedings for reconsideration (T. 369, 377). By order dated June 21, 1954, the Commission granted the petition for leave to file a petition for reconsideration, and reopened the proceedings for reconsideration (T. 377, 378).

The Commission on reconsideration, by its report and order dated October 4, 1954 (T. 379, 389) found that the assailed rates were applicable (T. 381), that there was no evidence that supported a finding that the assailed rates were unreasonable (T. 386), that the assailed rates were not unjust, unreasonable or otherwise unlawful, and dismissed the complaints (T. 387, 388, 389).

On November 5, 1954, the appellees filed a petition for reconsideration of the orders dismissing the complaint (T. 389-406), which was denied by the Commission by order dated January 3, 1955 (T. 406).

On April 15, 1955, the appellees instituted proceedings in the United States District Court for the Western District of Washington, to annul and set aside the orders of the Commission dismissing the complaints in the above mentioned proceedings. The order in *Alouette Peat Products, Ltd. v. The Atchison, Topeka and Santa Fe Railway Company, et al.*, Docket No. 30260, was the subject of the complaint in Cause No. 3923 (T. 3 to 13, incl.), and the order in *Acme Peat Products, Ltd., et al., v. The Akron, Canton & Youngstown Railroad Company, et al.*, Docket No. 29974, was the subject of the

complaint in Cause No. 3924 before the United States District Court.

Inasmuch as the parties had stipulated in *Alouette Peat Products, Ltd. v. The Atchison, Topeka and Santa Fe Railway Company, et al.*, Docket No. 30260 (T. 5) that the complaint be submitted for decision and be decided on the record made in *Acme Peat Products, Ltd., et al. v. The Akron, Canton & Youngstown Railroad Company, et al.*, Docket No. 29974, it was stipulated in the United States District Court (T. 24-25) that Cause No. 3924 be consolidated with Cause No. 3923 into one action for trial in the District Court, and an order consolidating these causes was entered (T. 26, 27). The record before the Commission was received in evidence (T. 83), together with certain excerpts from the carriers' tariffs (T. 84); the court heard argument of counsel, and, having announced its oral decision, entered findings of fact and conclusions of law finding and concluding as follows:

1. That the tariffs which the carriers filed naming the 20 per cent increase in rates on peat were illegal and void, and the appellees are entitled to recover all sums of money exacted by the carriers under such tariffs in excess of the rates which were in effect immediately prior to the publication and filing of such tariffs (Findings of Fact Nos. V and VI, Conclusion of Law No. II, T. 31-35, incl.).

2. That by increasing their rates, the carriers damaged the appellees by causing a loss of markets (Finding of Fact No. VII, T. 33).

3. That the Commission by granting the second peti-

tion of the railroads for reconsideration violated its own rules, and as a result thereof denied the appellees due process (Conclusion of Law No. IV, T. 35).

The court entered judgment reversing the orders of the Commission, remanding the proceedings to the Commission for the purpose of making and entering a reparations order consistent with the findings of fact and conclusions of law made by the court (T. 39).

III. SPECIFICATIONS OF ERROR

I.

The District Court erred in finding and concluding that the railroads failed to comply with the Commission's order in *Ex Parte 162, Increased Railway Rates, Fares, and Charges, 1946*, 264 I.C.C. 695, 266 I.C.C. 537, when they published the rates here considered. (Findings of Fact Nos. V and VI, Conclusion of Law No. II, T. 31-35, incl.).

II.

The District Court erred in concluding that the tariffs which the railroads published, and which were accepted by and filed with the Commission, naming the rates here considered, were illegal, void, and inapplicable, and that the rates which were in effect immediately prior to the rates named in tariffs here considered were the rates which are applicable to the shipments here in question (Conclusion of Law No. II, T. 34-35).

III.

The District Court erred in finding and concluding that the increase in rates here considered damaged the appellees (Finding of Fact No. VII, T. 33).

IV.

The District Court erred in failing to sustain the Interstate Commerce Commission's conclusion that the appellees failed to establish any violation by the railroads of the Interstate Commerce Act or orders of the Interstate Commerce Commission, for which the appellees were entitled to damages.

V.

The District Court erred in concluding that the Interstate Commerce Commission violated its own rules and as a result thereof denied the appellees due process by granting a second petition of the railroads for reconsideration as more particularly set forth in its order of June 21, 1954 (Conclusion of Law No. IV, T. 35).

VI.

The District Court erred in concluding that the plaintiffs are entitled to judgment against the defendants, and each of them directing that the orders heretofore made by the Interstate Commerce Commission be reversed, and that these causes be remanded to the Interstate Commerce Commission for the fixing of the amount of reparations due the appellees, together with interest thereon, and the entry of a reparations order consistent with the findings of fact, conclusions of law and judgment herein entered (Conclusion of Law No. V, T. 36); and in entering judgment reversing the orders of the Commission here considered and remanding the proceedings to the Commission for the purpose of fixing the amount of reparations due the appellees and the entry of a reparation order consistent with the court's Findings of Fact and Conclusions of Law.

IV. SUMMARY OF RAIROADS' ARGUMENT

The railroads in their argument will show,

First, that all the Commission required in its order in Ex Parte 162 was that in applying the increases there authorized, the carriers were to generally apply the increases to commodities as listed for statistical purposes, and the carriers complied with this general directive in publishing their rates.

Second, that even if the carriers exceeded the authority granted by the Commission in Ex Parte 162, when they published and filed the rates here considered, the filed rates were the only rates applicable to the shipments in question.

Third, if the carriers exceeded the authority granted by the Commission in Ex Parte 162, the mere showing of this violation would not in and of itself afford a basis for the award of damages to shippers. That where violation of the Interstate Commerce Act, or an order of the Commission, is shown, shippers can only recover damages therefor upon a showing (which is lacking on this record), that they were damaged thereby.

Fourth, That the Commission's rules permit the filing of a second petition for reconsideration, "for good cause shown, and upon leave granted," and that good cause was shown and leave was granted for the filing of the railroads' second petition.

V. ARGUMENT

Specification of Error No. I:

“The District Court erred in finding and concluding that the railroads failed to comply with the Commission’s order in Ex Parte 162, *Increased Railway Rates, Fares, and Charges, 1946*, 264 I.C.C. 695, 266 I.C.C. 537, when they published the rates here considered. (Findings of Fact Nos. V and VI, Conclusion of Law No. II, T. 31-35, incl.)”

The railroads, in increasing their rates in pursuance to the Commission’s order in Ex Parte 162, applied a 20 per cent increase with a maximum of 6 cents to the commodities grouped in their tariffs under the designation, “Fertilizers.” When peat, the commodity here considered, was carried in the tariffs in the classification as “Fertilizers,” the maximum of 6 cents was therefore applied. However, in those instances, such as the one here presented by shippers located in British Columbia, where in order to give peat a lower rate than generally applied to “Fertilizers,” the carriers had removed peat from the fertilizer group in their tariffs and published rates applying only on “Peat,” the carriers applied a full 20 per cent increase (T. 259, 260, 224, 380, 381). This publication by the carriers was not through inadvertence, but was the result of the carriers’ interpretation of what the Commission intended by its order in Ex Parte 162 (T. 259, 260). Furthermore, when the carriers applied the 6-cent maximum to the peat rates, they considered this to be their own voluntary act, and was not accomplished because of any requirement of the Commission (T. 260).

What had the Commission required in its order in Ex Parte 162? The Examiner who heard the case for the Commission in his proposed report said this:

“In view of the fact that Ex Parte 162 was a proceeding nation-wide in scope, involving every commodity transported by rail, the Commission could only set forth in general terms how the increases it allowed should be applied.” (T. 312)

The report, including the appendix, covers some 88 pages in the printed volume (pages 537 to 623, inclusive). In order to give the carriers a guide as to its intention, the Commission annexed an appendix to its report and made reference to the classification of commodities for statistical purposes, and said this:

“Basic freight rates, whether class or commodity, and charges, on the commodities hereinafter specified, may be increased in the amounts and in the manner set forth as to each commodity class or group. * * * They are intended *generally* to cover the items customarily included by the carriers in their reports to the Commission under each numbered description, * * * ” (Emphasis supplied) (T. 323-324)

In the initial decision in the instant case, the Commission admits that all they did in Ex Parte 162 was to give a general indication of how the Commission intended the increases to be applied. The Commission there said this:

“The Commission set forth in general terms how the general increases authorized December 5, 1946. should be applied.” (T. 323)

Yet the Commission in its initial decision in this case (T. 321), and in the decision on reconsideration (T.

379), made no finding that the carriers had failed to generally apply the increases to the commodities as grouped in the statistical grouping. The substance of the Commission's finding in both of these decisions is that by the language employed by the Commission in its order in Ex Parte 162, there could be no exceptions to a strict adherence to the application of the increases to the commodities as listed in the statistical grouping. If, as the Commission later stated, it was their intention to permit no deviations from the statistical grouping, it would have been a simple matter for the Commission to have so required. All the Commission needed to have said was that the increases allowed by the order would be applied to the commodities as listed in the statistical grouping. The use of the phrase that the increases are intended generally to apply to the commodities as listed, implies that there would be exceptional situations that would require deviations from a strict adherence to this application. In *Sims v. Scheussler*, 5 Ga. 850, 64 S.E. 99, at 102, the court commented on the use of the word "generally" as follows:

"In the absence of binding authority, therefore, to the contrary, we must believe that, by the use of the word 'generally' in the Code section, it was at least intended to provide for exceptions from the general rule * * *."

In *Kaname Tokaji v. State Board of Equalization*, 20 Cal. App.(2d) 612, 67 P.(2d) 1082, at 1085, the court said:

"Indeed the wording of the treaty itself indicates such a purpose, for, although it is provided that the subjects of each shall have liberty in the territories of the other to carry on trade, such lib-

erty is qualified by the further provision 'and *generally* to do anything incident to or necessary for trade upon the same terms as native citizens.' (Italics added.) In the absence of the word '*generally*,' the treaty rights would be without limitation. Obviously, then, the word '*generally*' must be interpreted to mean that the contracting parties contemplated possible exceptions. In other words, construing the word in connection with the context, it can only mean that an *approximate* application of the treaty terms was to be effected, as opposed to a *definite* and *unqualified* application."

When the Commission's order in Ex Parte 162 came down, the carriers were charged only with the duty of reasonably interpreting and applying that order. The carriers' interpretation that the Commission recognized and intended that where the carriers found exceptional circumstances, they were permitted to deviate from a strict adherence to the grouping of commodities for statistical purposes, is a reasonable interpretation of the Commission's language used in that order. This court should find that the carriers were authorized to publish the increase in rates here considered.

Specification of Error No. II:

"The District Court erred in concluding that the tariffs which the railroads published, and which were accepted by and filed with the Commission, naming the rates here considered, were illegal, void, and inapplicable, and that the rates which were in effect immediately prior to the rates named in tariffs here considered were the rates which are applicable to the shipments here in question. (Conclusion of Law No. II, T. 34-35)"

The trial court, having found that the carriers had

not complied with the Commission's order in Ex Parte 162 when they increased their rates, then erroneously concluded that rates named in the filed tariffs never became effective.

It is not contended that the assailed rates were not published and filed with the Commission. The principal witness for the complainants at the hearing before the Commission acknowledged that the rates were filed and became effective January 1, 1947. He testified:

“It was a nationwide, permanent increase. *It was incorporated in the rate structure at that time; it was not temporary.*” (T. 198) (Emphasis supplied)

The contention of the appellees before the Commission and before the District Court was not that the tariffs naming the increase in rates were not published and filed with the Commission, but that these tariffs, even though published, accepted by and on file with the Commission, did not name the applicable rates.

The Commission in its initial decision and decision on reconsideration found that the tariffs became effective on January 1, 1947, since they were accepted by the Commission and were filed (T. 326, 381). In the initial decision the Commission said this:

“Where tariffs are tendered to and accepted by the Commission, the rates therein become applicable, even though technically they should have been rejected upon tender.” (Citing cases) (T. 326)

In the final decision the Commission said this:

“As stated by the division in the prior report the complainant's contention that the assailed rates

were not applicable has no merit since a rate published in a tariff on file with the Commission does not become inapplicable by reason of the fact that it contravenes an order of the Commission or was published on short notice without authority." (T. 381)

If the requirement that tariffs must be filed is to mean anything, this has to be the rule. Any other rule would defeat the very purpose for requiring tariffs to be published and filed. Congress has required carriers to file their tariffs with the Commission to make certain that there will be but one rate that can be applied at any given moment of time. This is the only way preference and discriminations prohibited by the Act can be prevented. The filing of a tariff with the Commission is a physical thing, no different than the filing of a document with the Clerk of this Court. The tariff or document is filed, or it isn't filed. If the Commission accepts it and puts it on file, or if the Clerk accepts it and puts it on file, the document is on file. The tariffs here considered were accepted and were filed by the Commission.

The requirement of filing tariffs under the supervision of the Commission not only is for the purpose of requiring carriers to state publicly what rates they can charge at any given moment, but is required to enable shippers to ascertain what these rates are. Shippers not only are entitled to know what rates a carrier may charge, but are entitled to know what rates their competitors must pay.

The trial court's conclusion will permit collateral attacks to be made on tariffs which are on file and ac-

cepted by the Commission. The District Court has held that even though tariffs are accepted and filed with the Commission, the rates named therein can be made inapplicable by showing something that happened prior to the time the rates were accepted and filed.

Under the rule announced by the Commission, a shipper or a competitor can ascertain from the Commission what rates have been accepted and are on file. If the court adopts the rule here announced by the District Court, this inquiry by a shipper or competitor will not be sufficient. Not only will such a party have to ascertain what rates are on file to cover his particular commodity and movement, but he will have the further burden of ascertaining by a search of the Commission's records that the rate which the Commission certifies is on file came into being only upon a strict observance of all of the Commission's rules, prior orders, and regulations relating to tariff publication.

This ruling by the District Court, if it becomes the established law, will destroy the very purposes Congress had in mind in requiring the publication of rates in the first instance. The great purposes of the Interstate Commerce Act are to prevent discrimination and undue preferences in the carriage of freight by railroad. The means by which these purposes were to be accomplished is the requirement that rates had to be filed with the Commission so they would be uniformly applied to all shippers. *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 51 L.ed. 553; *Southern R. Co. v. Reid*, 222 U.S. 443, 56 L.ed. 263.

Rates on file with the Commission cannot be made in-

applicable by any failure of the carriers to otherwise comply with the Act. *Texas & P. R. Co. v. Cisco Oil Mill*, 204 U.S. 449, 51 L.ed. 562; *United States v. Miller*, 223 U.S. 599, 56 L.ed. 568.

If the Commission accepts and files a tariff, the rates named therein become the only applicable rates even though such rates were published in direct violation of an express requirement of the Interstate Commerce Act. *Davis v. Portland Seed Co.*, 264 U.S. 403, 68 L.ed. 762. In that case the court said at page 415:

“Relying on *Pennsylvania R.R. Co. v. International Coal Co.*, 230 U.S. 184, the Interstate Commerce Commission has definitely rejected respondent’s theory by many opinions, and holds that while a charge prohibited by the long and short haul clause, § 4, may subject the carrier to prosecution by the Government it does not afford adequate basis for reparation where there is no other proof of pecuniary damage.* * *

And see *Louisville & N. R. Co. v. St. Regis Paper Co.*, 102 F.Supp. 713; *United States Mexican Oil Corporation v. Pennsylvania R. Co.*, 20 F.(2d) 385.

Neither clerical errors nor failure of the carriers to comply with orders of the Commission will protect the carriers or prevent the filed rate from being applicable. *Chicago, I. & L. Ry. Co. v. International Milling Co.*, 43 F.(2d) 93, certiorari denied 282 U.S. 885, 75 L.ed. 781; *Beaumont, Sour Lake & Western Ry. Co. v. Magnolia Provision Co. et al.*, 26 F.(2d) 72, certiorari denied 278 U.S. 620, 73 L.ed. 542.

The District Court’s conclusion that rates filed with the Commission were inapplicable because of the man-

ner in which they were published, is erroneous and is unsupported by authority.

Specifications of Error Nos. III and IV:

“The District Court erred in finding and concluding that the increase in rates here considered damaged the appellees. (Finding of Fact No. VII, T. 33)”

“The District Court erred in failing to sustain the Interstate Commerce Commission’s conclusion that the appellees failed to establish any violation by the railroads of the Interstate Commerce Act or orders of the Interstate Commerce Commission, for which the appellees were entitled to damages.”

If it be assumed that the carriers violated the order of the Commission in *Ex Parte* 162 when they published the assailed rates, the Commission was correct in dismissing the complaints because the appellees failed to prove that they were damaged by this claimed unlawful act. The Supreme Court in *Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U.S. 183, 57 L.ed. 1447, points out that shippers are not entitled to damages upon showing only a violation of the Interstate Commerce Act. The court said, at page 1452:

“But, as said in *Parsons v. Chicago & N.W. R. Co.*, 167 U.S. 460, 42 L.ed. 236, 17 Sup.Ct. Rep. 887, construing this section (8), ‘before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.’ Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what, though called damages, would really be a penalty, in addition to the penalty payable to the government.”

The doctrine of unjust enrichment adopted by the Commission in the initial decision in this proceeding was rejected by the Supreme Court in *Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co.*, 269 U.S. 217, 70 L.ed. 242:

“The liability in the case at bar arises out of the wrongful exactment from the shipper, not out of the unlawful receipt or unjust enrichment by the carrier.”

Except for the first report of the Commission in this case, 277 I.C.C. 641, and the first decision in *F. W. Bologiano & Co., Inc. v. Baltimore & O. R. Co.*, 289 I.C.C. 169, which was made in reliance on the first decision in this case (both of which decisions now stand reversed on reconsideration), the Commission in a long line of decisions has consistently held that where a tariff is published, accepted by it and filed, the tariff names the applicable rates, and shippers are not entitled to damages merely upon showing that in publishing and filing such rates the carriers violated an order of the Commission. *Brown & Sons Lumber Co. v. L. & N. R.R. Co.*, 37 I.C.C. 507; *Traffic Bureau of the Toledo Commerce Club v. Ann Arbor RR Co. et al.*, 45 I.C.C. 527; *Greene Cananea Copper Co. v. Director General*, 80 I.C.C. 121; *Greene Cananea Copper Co. v. C., R.I. & P. Ry Co.*, 88 I.C.C. 225; *Kansas City Fuel Oil Co. v. Atchison, T. & S.F. Ry. Co.*, 210 I.C.C. 134; *Texas Produce Co. v. Illinois Central R. Co.*, 209 I.C.C. 113; *Ralston Purine Co. v. Atlanta, B. & C. R. Co.*, 174 I.C.C. 722; *Dewey Portland Cement Co. v. Atchison, T. & S.F. Ry. Co.*, 185 I.C.C. 233; *Greene Cananea Copper Co. v. Director General*, 102 I.C.C. 473; *Concrete Engineering Co. v. Baltimore*

& *O. R. Co.*, 160 I.C.C. 675; *National Erie Corp. v. New York Central R. Co.*, 237 I.C.C. 4.

The appellees predicate their case on the contention that by the mere showing that the carriers exceeded the authority granted by the Commission in its order in *Ex Parte* 162 they are entitled to damages. We have already demonstrated that this is not enough. Moreover, there is no evidence from which it could be concluded that the rates the appellees were charged were unreasonable, discriminatory, or otherwise unlawful.

In its initial decision in this case, the Commission did not find that the assailed rates were unreasonably high. In that decision, 277 I.C.C. 641 at page 645, the Commission avoided the issue by holding that the evidence that the rates are reasonable, “ * * * misses the crux of the issue * * * ” and decided the case on the theory of unjust enrichment.

The Commission in its final decision in this case, after discussing the evidence found,

“There is no evidence that can be said to afford a sound basis for a finding of unreasonableness.”
(T. 386)

This finding of the Commission is supported by the evidence, and therefore must be accepted by the court.

In reviewing orders of the Interstate Commerce Commission,

“ * * * the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. ‘The findings of the Commission are made by law *prima facie*

true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Illinois C. R. Co. v. Interstate Commerce Commission*, 206 U.S. 441, 51 L.ed. 1128, 27 Sup.Ct.Rep. 700. Its conclusion, of course, is subject to review, but, when supported by evidence, is accepted as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof, but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

Interstate Com. Com. v. Union P. R. Co., 222 U.S. 541, 56 L.ed. 308.

See also *Akron C. & Y. R. Co. v. United States*, 261 U.S. 184, 67 L.ed. 605; *Western Paper Makers Chemical Co. v. United States*, 271 U.S. 268, 70 L.ed. 941.

The only evidence the appellees introduced in the proceedings before the Commission bearing on the intrinsic reasonableness of the assailed rates was their Exhibit No. 1. In that Exhibit, the car mile earnings under the level of the rates here contended for by the appellees are compared to the earnings which the carriers would receive on rates published at the lowest possible level the Commission would permit (T. 229). The revenue returned to the carriers on the lowest permitted level of rates is 10 cents per car mile, which the Commission uses as a minimum below which the carriers may not go in publishing rates pursuant to orders issued by the Commission under the Fourth Section of the Act, Title 49 U.S.C. A.9 Sec. 4 (T. 229). The level of rates sought by the appellees would return .1214 cents per car mile (Exhibit 1). Rates that will return but 2

and a fraction cents above the lowest permitted minimum rate certainly are not shown to be unreasonable.

The carriers, on the other hand, with respect to the rates applying from British Columbia to Midwestern Territory, compared the level of the assailed rates which returned the carriers from about 12½ cents per car mile to a high of 21 cents per car mile (Exhibit No. 14), with rates published to apply on fertilizers moving from the same origin group to the same destination (Exhibit No. 15). These fertilizer rates return to the carriers revenue in cents per car mile of a low of 19 cents to a high of 50 cents, most of the rates returning something on the average between 20 and 40 cents per car mile. Had the shippers been charged the fertilizer rates, increased by 6 cents, they would have paid charges substantially higher than those they now assail.

The rail carriers also showed the history of the rates applying from British Columbia to Midwestern Territory (Exhibit No. 12). Commencing in 1936, the carriers, in order to enable the appellees to compete in the Midwestern markets far distant from their points of origin, established extremely low rates (T. 257). In 1940 the reduced basis of rates was published to apply to substantially all of the Middlewest and Eastern Territory on a related basis to the reduced rates published in 1936 (T. 258). The rates which the appellees paid following the 20 per cent increase were substantially lower than what they would have paid had the carriers not given them these sharp reductions in their rates and charged them the fertilizer rates increased by 6 cents.

The favorable rate treatment the appellees received

can be illustrated by examining the rates published to California. Commodity rates on peat were first published from British Columbia to California in 1937. These rates were 80 cents to San Francisco Bay District, and 100 cents to Southern California. They were increased pursuant to authority granted by the Interstate Commerce Commission in Ex Parte 123 to 88 cents and \$1.10 respectively. Because of the competition of imported peat from Sweden and Germany, the carriers voluntarily reduced these rates in 1939 to 58 cents to the San Francisco area and 73 cents to Los Angeles,—30-cent reduction in rates to San Francisco and 37-cent reduction in rates to Los Angeles (Exhibit 17, T. 275-277).

Had there been no voluntary reductions in rates, and had the carriers increased the rate in the manner in which the appellees insist should have been done by applying a 6-cent maximum increase as a result of the order in Ex Parte 162, the rate to San Francisco would have become 94 cents and the rate to Los Angeles \$1.16. The rates they assail as being unreasonable, on the other hand, are 70 cents to San Francisco and 86 cents to Los Angeles. Consequently, even with the full 20 per cent increase of the voluntarily reduced rates, the appellees are enjoying rates to San Francisco which are 24 cents per cwt. lower, and to Los Angeles 26 cents per cwt. lower, than rates which the carriers could have maintained had they elected to do so (Exhibit 18, T. 279). The Commission's finding that there is no evidence that can be said to afford a sound basis for a finding of unreasonableness is completely supported by this record.

Since, under the Interstate Commerce Act, the carriers were left with the power to initiate rates, *Skinner & Eddy Corp. v. United States*, 249 U.S. 557, 63 L.ed. 772, if the carriers exceeded the authority granted by the Commission in increasing their rates, this act in and of itself did not damage the appellees. If we assume a violation of the order, all that happened was that these increased rates became effective on 5 days notice rather than the 30 days notice required by Title 29 U.S.C.A. Section 6(3). All that the carriers asked for and obtained in the Ex Parte 162 proceeding was authority to publish an increase in rates on 5 days notice rather than the usual 30-day notice.

The rates which the Commission authorized were not prescribed rates, and if the increases, authorized or unauthorized, resulted in the collection of unreasonable or unlawful charges, nothing prevented any shipper from claiming reparation. This is made clear by the Commission in its finding 15, in Ex Parte 162, 266 I.C.C. 537 at 617, where it made reference to the decision in *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370, 76 L.ed. 348. Consequently, the appellees stood in no different position than all the other shippers whose rates were increased.

The Commission, on substantial evidence in this record, found that the charges which the appellees were required to pay were reasonable.

“ * * * the commission may not order or permit payment of damages by way of reparations without finding that the amount of the charge was unjust and unreasonable.”

Great Northern R. Co. v. Sullivan, 294 U.S. 458, 79 L.ed. 992.

Citing *News Syndicate Co. v. New York C. R. Co.*, 275 U.S. 187, 72 L.ed. 228.

These appellees have been required to pay nothing more than reasonable charges for the service which they received. They were not damaged, and the Commission properly dismissed the complaints.

Specification of Error No. V:

“The District Court erred in concluding that the Interstate Commerce Commission violated its own rules and as a result thereof denied the appellees due process by granting a second petition of the railroads for reconsideration as more particularly set forth in its order of June 21, 1954. (Conclusion of Law No. IV, T. 35)”

The procedure established by the Commission for filing petitions for reconsideration is set forth in their General Rules of Practice in Rule 101 (See Appendix to Title 49 U.S.C.A. Sections 381 to end, at page 477).⁴ There are two parts to that rule which are material here,—Subsections (e) and (f), which read as follows:

“(e) *Time for filing.* Except for good cause shown, and upon leave granted, petitions under this rule must be filed within 30 days after the date of service of a decision or order granting an application in whole or in part, and within 60 days after the date of service of any other character of decision or order.

“(f) *Successive petitions on same grounds, not entertained.* A successive petition under subdivision (d) of this rule filed by the same party or parties, and upon substantially the same grounds as a former petition, which has been considered and

⁴Since amended but not in a manner here material. See the 1956 Supplement to the cited volume.

denied by the entire Commission, or by an appropriate appellate division, will not be entertained.”

It is to be noted that successive petitions on the same grounds will not be entertained, and further, that a petition for reconsideration must be filed within 60 days after date of service of the order which the Commission is asked to reconsider. In order to bring themselves within the requirement of subsection (e), the carriers filed a petition for leave to file petition to reopen and reconsider (T. 369, 370).

As we have earlier pointed out in this brief, it was in the first decision in these proceedings in which the Commission first adopted the rule that where carriers file tariffs with the Commission naming increased rates, if the Commission subsequently finds the increases were not authorized, the Commission should grant reparations, on the theory that in collecting the unauthorized increases the carriers were unjustly enriched. Not only was this the first decision in which such a doctrine was announced, but this decision overruled a long line of authority to the contrary. (See cases cited pages 20-21 of our brief.)

The initial decision in this case was then followed by the decision (*F. W. Bolgiano & Co., Inc. v. Baltimore & O. R. Co.*, 289 I.C.C. 169) which involved the same issues, and in which the Commission, relying on the initial decision in this case, again awarded reparations. As shown by our petition for leave to file a petition (T. 369-370), after the Commission had denied the carriers' first petition for reconsideration, the carriers had elected to require the appellees to sue to enforce the Commission's reparation order. No suit had been

brought; consequently no reparations had been paid when the Commission, on reconsideration, reversed its first decision in the *Bolgiano* case, and rejected the doctrine that reparations under the circumstances here presented should be paid on the theory of unjust enrichment. *F. W. Bolgiano & Co., Inc. v. Baltimore & O. R. Co.*, 291 I.C.C. 659.

In rejecting the doctrine of unjust enrichment in that proceeding, the Commission again adhered to the theretofore long established doctrine that the mere showing of a violation of a Commission order in the publication and filing of increased charges would not in and of itself give rise to damages in the absence of proof that shippers were in fact damaged.

It was this change in circumstance that the carriers relied on in petitioning for leave to file their second petition for reconsideration, and that caused the Commission to accept the second petition for reconsideration and reopen the proceedings (T. 369, 370, 377, 378). The granting of leave to file the second petition for reconsideration was fully justified. The second petition for reconsideration was tendered in strict conformity to the Commission's rules.

The District Court erred when it concluded that the Commission had violated its own rules and denied the appellees due process.

Specification of Error No. VI:

“The District Court erred in concluding that the plaintiffs are entitled to judgment against the defendants, and each of them directing that the orders heretofore made by the Interstate Com-

merce Commission be reversed, and that these causes be remanded to the Interstate Commerce Commission for the fixing of the amount of reparations due the appellees (plaintiffs below), together with interest thereon, and the entry of a reparations order consistent with the findings of fact, conclusions of law and judgment herein entered (Conclusion of Law No. V, T. 36); and in entering judgment reversing the orders of the Commission here considered and remanding the proceedings to the Commission for the purpose of fixing the amount of reparations due the appellees and the entry of a reparation order consistent with the court's Findings of Fact and Conclusions of Law."

We have shown that the Commission correctly concluded that the appellees have failed to show that they were damaged by any action of the defendants; that the rates which the appellees were charged by the defendants were the applicable rates, and were reasonable and lawful; that the Commission has conducted these proceedings in conformity to its rules, and has afforded the appellees due process of law.

VI. CONCLUSION

The orders of the Commission dismissing the complaints should be affirmed. The judgment of the District Court should be reversed and set aside, with instructions to enter judgment dismissing the case.

Respectfully submitted,

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